No. 90-898

In The

Supreme Court of the United States

October Term, 1990

WILLIAM H. KUCHAREK; SHANGRI-LA ENTERPRISES, INC., doing business as DENMARK BOOKSTORE; PARADISE ONE, INC., doing business as PARADISE VIDEO STORE; AND GEM BOOKS, INC. doing business as PURE PLEASURE II BOOKSTORE,

Petitioners,

vs.

DONALD J. HANAWAY, Attorney General of the State of Wisconsin,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does Wisconsin's obscenity statute establish an unworkable and unconstitutionally vague guideline for distinguishing legal materials from prohibited materials, because it permits commerce in materials portraying explicit scenes of sexual conduct, so long as that conduct is simulated, but bans commerce in depictions and descriptions of actual sexual conduct?

2. Does the obscenity statute deny booksellers and videocassette dealers who distribute sexually explicit material equal protection of the law because it expressly exempts low-cost "contract printers" who publish obscenity as well as schools and libraries that commercially disseminate obscenity from criminal liability?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners and respondent were parties to the proceedings in the United States District Court for the Eastern District of Wisconsin and the United States Court of Appeals for the Seventh Circuit. The caption of proceedings in the Court of Appeals, however, omitted a reference to petitioner Gem Books, Inc.

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OPINION BELOW

The opinion of the United States Court of Appeals rendered

on May 7, 1990 is reported at 902 F.2d 513 (7th Cir. 1990). The opinion is contained in the appendix to this petition.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and judgment on May 7, 1990. An order denying a petition for rehearing and suggestion for rehearing en banc was entered on July 12, 1990. Review in this Court is sought pursuant to 28 U.S.C. § 1254(1).

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I provides in part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

United States Constitution, Amendment V provides in part:

> No person shall . . . be deprived of life, liberty or property, without due process of law . . . .

United States Constitution, Amendment XIV provides in part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin Statute § 944.21 (1987-88) is set forth verbatim in the Appendix.

STATEMENT OF THE CASE

Wisconsin's present obscenity statute, Wis. Stat. § 944.21 (1987-88) became effective June 17, 1988. Petitioners, two adult bookstores, an adult bookstore clerk, and a general videocassette rental store, filed an action on June 21, 1988 in the United States District Court for the Eastern District of Wisconsin, and sought a declaration that the new statute was unconstitutional along with an injunction against its enforcement. Jurisdiction of the district court was based on 28 U.S.C. §§ 1331 and 1343(3) with petitioners' causes of action founded on 42 U.S.C. § 1983, 28 U.S.C. §§ 2201 and 2202, and the First and Fourteenth Amendments to the United States Constitution.

Petitioners charged that the law was unconstitutionally vague because it was unclear whether it encompassed materials containing simulated depictions of sex acts and also whether it applied to videotape materials. Assuming that simulated materials were not covered, petitioners argued that the statute still would be unconstitutional because of the unintelligible and vague distinction between materials depicting actual sex acts and those containing simulations of such acts. Also, because the statute exempted certain publishers for commercially printing obscenity, and exempted schools and libraries for commercially distributing such material, while booksellers, magazine dealers, and videocassette dealers still were subject to prosecution for dealing in the same materials, petitioners challenged the statute as violative of the Equal Protection Clause.

On June 12, 1989, the district court concluded that the distinction in the statute between actual depictions and simulated depictions of sexual conduct permeated the entire statute and rendered it unconstitutionally vague. The court enjoined enforcement of the statute.

The district court rejected petitioners' other vagueness challenge in which they asserted that the statute failed to specify whether videotape materials were covered at all. The court did agree with petitioners' argument that the statute denied equal protection of the laws by arbitrarily exempting contract printers, schools and libraries from its prohibitions. The court held, however, that those exemptions were severable and that the entire statute therefore should not be invalidated.

Attorney General Hanaway appealed on September 1, 1989. In the United States Court of Appeals for the Seventh Circuit respondent Hanaway argued that the statute was not vague in its prohibitions because videotape materials were intended to be covered and simulated sex materials were not. He also argued that it was reasonable for the legislature to enact the exemptions under challenge both to protect schools and libraries from groundless censorship efforts and to allow contract printers to provide low-cost printing services without having to editorially review their printed product. The court reversed the district court's decision, concluding that the statute was not vague in the constitutional sense, 902 F.2d at 519, and that the statutory exemptions for contract printers, schools and libraries were not irrational or unconstitutional, *id.* at 520-21.

REASONS FOR GRANTING THE WRIT

I.

THE DIVIDING LINE BETWEEN SEXUALLY EXPLICIT MATERIALS DEPICTING OR DESCRIBING ACTUAL SEXUAL CONDUCT AND THOSE THAT DEPICT OR DESCRIBE EXPLICIT, YET SIMULATED SEX ACTS, IS TOO UNWORKABLE AND VAGUE A STANDARD FOR IMPOSING CRIMINAL LIABILITY UNDER WISCONSIN'S OBSCENITY STATUTE.

Wisconsin's obscenity statute applies to any commercial performance or commercial dealing in material which "describes or shows" sexual conduct in a patently offensive way. Wis. Stat. §§ 944.21(2)(c) and (d). The "sexual conduct" described or shown in a prohibited fashion is defined as the "commission" of sexual acts ranging from intercourse to lewd exhibition of the genitals. § 944.21(2)(e).

The statute represents a noticeable departure from the obscenity test crafted and approved by the United States Supreme Court in *Miller v. California,* 413 U.S. 15, 24-25 (1973). The Court's obscenity definition referred to material that "depicts or describes, in a patently offensive way, sexual conduct" meaning "ultimate sexual acts, normal or perverted, actual or simulated." *Id.* By contrast, the Wisconsin legislation refers to materials or performances that describe or show the "commission" of sexual acts, an indication that the legislature decided to prohibit one category of obscenity mentioned in *Miller, i.e.,* depictions or descriptions of *actual* sexual conduct, but not the other category of obscenity constituting simulated conduct.

By wandering from the *Miller* formulation, the Wisconsin legislature created the very confusion that this Court's decision

sought to avoid.

> We acknowledge . . . the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. [Citation omitted.]
>
> * * *
>
> Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution.

Miller v. California, 413 U.S. 15, 24, 27 (1973).

Respondent Hanaway, as Attorney General of the State of Wisconsin, argued in the Court of Appeals that the statute does not apply to simulations — "even the most realistic simulations." 902 F.2d at 518. The Court of Appeals then thought it was paradoxical that petitioners were complaining about the operation of an obscenity statute even more lenient than the one reviewed in *Miller v. California. Id.* at 515. But petitioners have no quarrel with the Wisconsin legislature's apparent decision to rein in the coverage of the statute. It is the formula the legislature chose to accomplish its purpose that presents the constitutional issue.

A few examples, drawing on past obscenity cases from Wisconsin and other jurisdictions, will demonstrate the problem.

As a beginning point, this Court should consider how unworkable the Wisconsin statute would be if it were applied to sexually explicit verbal performances or recordings. In *Skyywalker Records, Inc. v. Navarro,* 739 F. Supp. 578 (S.D. Fla. 1990), the district court was asked to decide whether the plaintiffs' "rap music" recording, *As Nasty As They Wanna Be (Nasty)*, performed by a group known as "2 Live Crew," was obscene under Florida's obscenity statute.[1] Unimpressed by the fact that public sales of the recording reached 1.7 million copies, the Broward County Sheriff sought to prohibit its distribution, claiming it was obscene. The district court agreed:

> [I]ts lyrics and the titles of its songs are replete with references to female and male genitalia, human sexual excretion, oral-anal contact, fellatio, group sex, specific sexual positions, sado-masochism, the turgid state of the male sexual organ, masturbation, cunnilingus, sexual intercourse, and the sounds of moaning.
>
> * * *
>
> The evident goal of this particular recording is to reproduce the sexual act through musical lyrics.
>
> * * *
>
> The recording depicts sexual conduct in graphic detail. The specificity of the descriptions makes the audio message analogous to a camera with a

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1. Unlike the Wisconsin statute, the Florida obscenity statute (F.S.A. § 847.001, *et seq.*) "tracks the language of the controlling case of *Miller v. California*" in defining obscenity, 739 F. Supp. at 585, and specifically includes materials depicting both actual and simulated sex acts, *id.* at 591.

> zoom lens, focusing on the sights and sounds of various ultimate sexual acts.

Id. at 591-92.

The court had no difficulty in deciding that the lyrics fell within the Florida statute because it prohibited depictions of *both* actual and simulated sex acts. But what if the case had arisen in Wisconsin? How would a retail music store know whether its distribution would be permitted or prohibited when the obscenity ban, according to the Attorney General himself, applies only to depictions of actual sex? More importantly, how would a judge or jury decide the issue and what instructions could a trial judge offer a jury to resolve the issue?

Perhaps all verbal descriptions of sexual conduct are simulations, so that the statute would *never* apply in such circumstances. On the other hand, such descriptions necessarily "describe" *actual* sexual conduct[2]; so then the statute would *always* apply in such circumstances. But such an interpretation would make the legislature's distinction meaningless.

The district court in *Skyywalker* found that the recording described actual sex acts; but presumably the lyrics referred to fictional or pretend situations. In Wisconsin, such verbal depictions or descriptions of *fictional* accounts of *actual* sex acts might not be subject to the statute's prohibitions. But then the trier of fact would have to decide whether the singer or lyricist was referring

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2. The district court in *Skyywalker Records* noted:

> The depictions of ultimate sexual acts are so vivid that they are hard to distinguish from seeing the same conduct described in the words of a book, or in pictures in periodicals or films.

Id. at 591.

to real or fictional accounts, hardly the type of fact that should determine criminal liability. Or perhaps the law would apply if the state presented evidence that the lyrics were *intended* to refer to actual sexual episodes, even though the recording itself did not specifically suggest as much. But a retailer or broadcaster, for example, could hardly be expected to have knowledge of such an intent. Yet criminal liability under the statute conceivably could hang on just such an absurdity.

The same confusions reappear when one moves from verbal descriptions to consider written descriptions of sexual conduct. Written materials could be an easy target under the Wisconsin law, even though it is not at all clear that such writings are subject to its provisions.[3] For example, in *Kois v. Wisconsin,* 408 U.S. 229, 231 (1972), this Court reviewed an "undisguisedly frank, play-by-play account of [an] author's recollection of sexual intercourse," describing actual sexual conduct which could be prohibited by the statute. This Court held that the writing was not obscene. But what if it had been obscene? Would it be legal or illegal under Wisconsin's new statute? Describing a "recollection" of actual sex surely is tantamount to writing a simulated account of sexual conduct. No judge or jury could tell the difference and neither could a bookseller or a magazine vendor.

The dividing line under the statute is not discernible because the Wisconsin legislature has created a permitted category of obscenity that cannot be distinguished from its illegal form. Hence, the statute simply fails to provide those minimal guidelines to govern law enforcement which due process requires. *Kolender v. Lawson,* 461 U.S. 352, 358 (1983).

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3. Magazines and books containing explicit references to sexual conduct are considered common fare at adult bookstores. 2 Attorney General's Commission on Pornography, U.S. Department of Justice, Final Report 1452-56 (1986). *See also, Ward v. Illinois,* 431 U.S. 767, 771 n. 3 (1977).

If one considers pictorial depictions of sex, even more confusion results. Pictures of "ultimate sexual acts" which focus on the bodies of actors presumably could fall within the Wisconsin statute. *See Jenkins v. Georgia,* 418 U.S. 153, 161 (1974). Yet some courts have concluded that such pictures portray only "simulated" sex, as the term was used in *Miller v. California,* as long as the actual contact involving sexual organs is not discernible or is obscured. *See, e.g., City of Urbana ex rel. Newlin v. Downing,* 43 Ohio St. 3d 109, 539 N.E. 2d 140 (1989). The Wisconsin law simply offers no guidance to decide this issue.[4]

The Court of Appeals thought the legislature's apparent distinction between portrayals of simulated and actual sex was paradoxical.

> [W]ith the resources of modern photographic and cinematographic technology, simulations of virtually any form of human behavior can be produced that are impossible for the viewer to distinguish from the real thing. A movie industry that can produce a shockingly realistic simulation of decapitation can produce a simulation of sexual intercourse so realistic that the viewer will believe that he is watching a movie of actual intercourse. From the viewer's standpoint, the depiction and the simulation are identical; if one is obscene, so is the other.

Kucharek, 902 F.2d at 518. The same observation was made in *United States v. Kantor,* 677 F. Supp. 1421, 1431 (C.D. Cal. 1987),

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4. Yet these kinds of edited pictures are very common. Films and videotapes with these types of depictions are often introduced into the subscription television market. 2 Attorney General's Commission on Pornography, U.S. Department of Justice, Final Report 1374 (1986).

vacated and remanded sub nom., United States v. U.S. Dist. Court for Cent. Dist. of Cal., 858 F.2d 534 (9th Cir. 1988): "The physical acts which actors are required to perform to achieve a simulation of intercourse may be entirely innocuous, even where the simulated visual effect may be more or less lascivious."[5]

What, then, is to prevent a police officer, a prosecutor, a judge or jury from arbitrarily and mistakenly condemning realistically simulated material under the Wisconsin statute? If, as the Court of Appeals suggested, "the consumer of pornography may not be able to distinguish an actual depiction of sexual intercourse from a highly realistic one," 902 F.2d at 519, why is there reason to think that police officers and prosecutors would be any better at drawing such distinctions?

The problem, therefore, is that by removing depictions of simulated sex from the prohibitions of the Wisconsin statute, the statute is rendered vague because of the difficulty both in defining and detecting what are simulated versus actual depictions of sex.[6] This difficulty leads necessarily to arbitrary, standardless, uninformed, and baseless official decisions to confiscate materials and to prosecute book, magazine, film and video dealers. For if the consumer cannot distinguish legal materials which portray simulated sex from illegal materials, portraying actual sex, neither can a law enforcement officer, a prosecutor, a judge or a jury.

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5. Such materials are commonly found at adult bookstores and other outlets. Dietz & Sears, *Pornography and Obscenity Sold in "Adult Bookstores": A Survey of 5132 Books, Magazines and Films in Four American Cities*, 21 Mich. J.L. Ref. 7, 15 (1988).

6. In a somewhat related context this Court stated: "The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . . ." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

The requirement that a criminal statute contain sufficiently ascertainable standards for enforcement and for the determination of guilt is not confined to statutes having a direct impact on First Amendment interests. The ascertainable standards requirement instead is related to due process concerns:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972) (footnotes omitted).

The Wisconsin obscenity statute offends these very same values because of its unworkable distinction between simulated and actual portrayals of sexual conduct.

II.

THE STATUTE DENIES BOOKSELLERS AND VIDEOCASSETTE DEALERS WHO DISTRIBUTE SEXUALLY EXPLICIT MATERIALS EQUAL PROTECTION OF THE LAW BECAUSE IT EXEMPTS LOW-COST CONTRACT PRINTERS WHO PUBLISH OBSCENITY AND SCHOOLS AND LIBRARIES THAT COMMERCIALLY DISSEMINATE OBSCENITY.

The new law does not penalize the non-commercial transfer or exhibition of obscenity at all. But all commercial transactions are penalized, except commercial transactions conducted by a director or employee of a school or library. This exemption is found in Wis. Stat. § 944.21(8). In § 944.21(5m) contract printers, their employees, and agents are also exempted for producing and disseminating obscene material, even though § 944.21(3)(a) clearly prohibits the commercial printing of obscene material.

Many states, including Pennsylvania, Delaware and Maryland, have statutes exempting schools and libraries from prosecution for *non-commercial* involvement with obscene materials. Wisconsin, however, in § 944.21(8) exempts schools and libraries for their *commercial* activities with such materials. The exemption, to say the least, is curious since adult bookstores and videocassette rental outlets serve the same commercial function as schools and libraries when they commercially disseminate obscene material. Moreover, video stores offer a wide range of cassettes, not just sexually explicit videos. Such stores are the lending libraries of contemporary American society. Their materials are "current" and "balanced." Further, they too "reflect the cultural diversity and pluralistic nature of American society." These are the very characteristics of schools and libraries, according to the Wisconsin legislature, that resulted in their receiving exempt status. *See* § 944.21(8)(a), Wis. Stats.

The exemption for contract printers, on the other hand, applies so long as the contract printer has no editorial control over the obscene material. Petitioner Kucharek challenged the new statute because he too lacked editorial control over his store's inventory and he had less responsibility for the production and distribution of his store's materials than his suppliers did, some of whom conceivably qualify as contract printers under the statute. If editorial control over the material is the critical factor, then those distributors, exhibitors, and retailers who also lack editorial control over their stock in trade should also be exempt. Moreover, these persons certainly have less responsibility for the creation and production of the material than contract printers, yet they would be subject to prosecution, even for felonious conduct, under § 944.21(2)(f).

Several courts have declared that exemptions for schools and libraries in obscenity statutes unconstitutionally discriminate against those who are otherwise subject to the statute's sanctions. In *Pollitt v. Connick,* 596 F. Supp. 261, 265 (E.D. La. 1984), the court declared the Louisiana obscenity statute invalid insofar as it exempted schools, churches, museums, libraries and similar institutions. The court relied on the reasoning of the Supreme Court of Louisiana which declared the same law unconstitutional in *State v. Luck,* 353 So. 2d 225, 232 (1977):

> Louisiana has no legitimate interest in allowing a college, etc., to sell pornography for commercial gain, while prosecuting a commercial establishment next door for the same activity.

See also, U.T., Inc. v. Brown, 457 F. Supp. 163 (W.D.N.C. 1978); *City of Duluth v. Sarette,* 283 N.W. 2d 533 (Minn. 1979).

Likewise, there can be no legitimate interest in allowing contract printers to produce and publish obscenity for commercial

gain, while prosecuting commercial establishments just down the road that sell the very materials that were produced due to the exemption in the statute. Because contract printers by their very nature have significant contact with their product, and because their conduct is integral to the subsequent commercial distribution process, the statutory exemption in § 944.21 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The commercial dissemination of obscenity does not become less commercial and the materials do not become less obscene simply because the transactions occur on college campuses or in libraries. Likewise, those who publish obscenity without reviewing its content are no different from those who sell or exhibit it without prior review.

The exemptions therefore fail to meet this Court's rational classification test under the Equal Protection Clause. *Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985). The activities of government-funded libraries and schools in the main are non-commercial. So § 944.21, which applies only to commercial dealings, could not be used to harass those institutions, even if their activities might happen to involve obscenity. The legislature's concern that such institutions be protected from over-zealous censorship efforts, therefore, is unfounded. No similar legislative concern for contract printers even appears in the statute. They are granted favored status without any explanation at all. These aspects of the legislation concretely demonstrate "an irrational prejudice" against those businesses that periodically deal in obscene materials, legal and illegal, as represented by the petitioners in this action. *Cleburne,* 473 U.S. at 450. They function no differently than lending libraries operating in a commercial fashion that are protected by the statute. Further, persons such as petitioner Kucharek have no greater involvement in the distribution of obscenity, both in its legal and illegal forms, than do the exempt

class of contract printers. In short, the exempt classifications established by § 944.21 are not rationally related to any legitimate governmental purpose. *Regan v. Taxation with Representation,* 461 U.S. 540, 547 (1983).

If these exemptions are invalid, the whole statute should be voided, even in light of its severability clause, § 944.21(10). The Wisconsin Supreme Court has expressly disfavored reliance on such devices to save obscenity legislation. In *State v. Princess Cinema of Milwaukee, Inc.,* 96 Wis. 2d 646, 292 N.W. 2d 807 (1980) the court noted that obscenity statutes in particular present questions of public policy which are exclusively reserved to the legislature.

> The job of drafting penal legislation is primarily one for the legislature. This court is once again being asked to judicially amend the obscenity statute to bring it into compliance with the presently perceived standards emanating from the United States Supreme Court . . . . We conclude, at this time, that this is a determination for the legislature.

96 Wis. 2d at 658, 292 N.W. 2d at 813-14.

In *Princess Cinema,* the court concluded that it was uncertain as to the degree to which the legislature and the people of the state wanted any particular kind of obscenity statute. Having made that judgment, the court concluded that once a constitutional flaw in the statute was discovered, the decision as to how it should be remedied resided solely with the legislature.

> We are recognizing that our job is one of interpreting statutes, not redrafting them . . . . This [obscenity] statute has been subjected to this

> Court's perception that the legislature and the people want an obscenity statute with those standards imposed. We feel that it is no longer our function to make this judgment.

96 Wis. 2d at 662, 292 N.W. 2d at 815.[7]

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7. Rather than invalidate the obscenity statute in its entirety, the court in *Princess Cinema* could have pointed to Wisconsin's general severability clause, Wis. Stat. § 990.001(11), to conclude that the statute should be given continued effect with its constitutional flaws removed. But the court instead favored invalidation of the entire statute. After invalidating exemptions in obscenity statutes and related legislation, several courts have voided completely the statutes at issue. *E.g., U.T., Inc. v. Brown,* 457 F. Supp. 163, 170 (W.D.N.C. 1978); *Wheeler v. State,* 281 Md. 593, 380 A.2d 1052 (1977), *cert. denied,* 435 U.S. 997 (1978); and *Tattered Cover, Inc. v. Tooley,* 696 P.2d 780 (Colo. 1985).

CONCLUSION

The Wisconsin obscenity statute represents a flawed effort to address delicate constitutional issues. The legislature tinkered with the *Miller* test for obscenity, perhaps believing that it needed improvement. It attempted to protect special interest groups by exempting contract printers and schools and libraries. The result of these disparate efforts was the creation of a hodgepodge of arbitrary distinctions, irrational exemptions and vague definitions.

For these foregoing reasons, petitioners respectfully request this Court to grant their petition for writ of certiorari.

Dated: October 10, 1990.

Respectfully submitted,

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APPENDIX A — OPINION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED MAY 7, 1990

In the

United States Court of Appeals

For the Seventh Circuit

No. 89-2885

WILLIAM H. KUCHAREK; SHANGRI-LA ENTERPRISES, INC., doing business as DENMARK BOOKSTORE; and PARADISE ONE, INC., doing business as PARADISE VIDEO STORE,

Plaintiffs-Appellees,

v.

DONALD HANAWAY, Attorney General of Wisconsin,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 88 C 657—J.P. Stadtmueller, *Judge.*

ARGUED FEBRUARY 21, 1990—DECIDED MAY 7, 1990

Before POSNER and EASTERBROOK, *Circuit Judges*, and MOODY, *District Judge.**

POSNER, *Circuit Judge.* The Attorney General of Wisconsin appeals from an order declaring—at the behest of several purveyors of sexually explicit books, magazines, and videotapes—Wisconsin's obscenity statute unconstitutional, and enjoining its enforcement. The statute, Wis.

* Hon. James T. Moody, of the Northern District of Indiana, sitting by designation.

Stat. § 944.21, was enacted in 1988, after eight years in which Wisconsin had no obscenity statute, the predecessor to section 944.21 having been held to violate the First Amendment in *State v. Princess Cinema, Inc.*, 96 Wis. 2d 646, 292 N.W.2d 807 (1980). Passage of a successor statute was stubbornly resisted by booksellers and publishers but eventually the differences between proponents and opponents were compromised by the enactment of a statute considerably less severe than authorized by *Miller v. California*, 413 U.S. 15 (1973). As the plaintiffs concede, Wisconsin could cure the infirmities that the district judge found in the statute by replacing it with one that went to the limits permitted by *Miller*, and such a statute would fence the plaintiffs in more tightly than the present one does. But the plaintiffs hope that if the Wisconsin legislature were faced with a choice between a stricter statute and no statute, it would choose no statute, in which event the plaintiffs would be under no state-law constraints at all and would therefore be even better off than they are under the present statute. This explains the paradox of pornographers' arguing that an anti-pornography statute is unconstitutional because too lenient, but it does not explain why the argument persuaded the district judge.

The statute defines obscene material as "a writing, picture, sound recording or film" which appeals to the prurient interest, describes or shows sexual conduct in a patently offensive way, and lacks any redeeming social value. Anyone who sells such material "with knowledge of [its] character and content" is guilty of a crime, but there are exemptions for contract printers and also for officers and employees of public, and accredited private, schools and public libraries. The district judge concluded, in a thoughtful opinion, that the statute is unconstitutionally vague, and therefore denies due process, insofar as it fails to indicate clearly whether simulations of sexual conduct as distinct from depictions or descriptions of actual sexual conduct are comprehended within the definition of "obscene," but not insofar as it fails to specify whether videotapes are included within the definition of

"material." The judge thought it plain that videotapes are included—the statute would be senseless otherwise—although the plaintiffs renew in our court their argument that the statute is hopelessly vague in this respect also. The judge further held that the statute denies the plaintiffs equal protection of the laws by arbitrarily exempting schools, libraries, and contract printers. He invalidated the statute in its entirety because he did not think that its vagueness could be cured by interpretation, but he added that the statute's severability clause would have allowed him to lop off the exemptions without invalidating the rest of the statute if they alone had been unconstitutional.

Although there have been as yet no prosecutions—of the plaintiffs or of anyone else—for violation of Wisconsin's new obscenity statute, it is early days, and the plaintiffs have made an adequate showing that they want to sell materials which the statute actually or arguably prohibits and that they are deterred from doing so by a reasonable fear of prosecution. So there is a real controversy between them and the state, and the suit can be maintained in a federal court without violating Article III of the Constitution. *Bowers v. Hardwick*, 478 U.S. 186, 188 (1986); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 327 (7th Cir. 1985), aff'd without opinion, 475 U.S. 1001 (1986); *Alleghany Corp. v. Haase*, 896 F.2d 1046, 1049 (7th Cir. 1990). The existence of an actual controversy is much clearer than in *Bowers*. Obscenity laws are enforced, though erratically and ineffectively; sodomy laws are not enforced. The plaintiff in *Bowers* had been arrested for committing sodomy, but he had not been prosecuted; nor had anyone else during the preceding forty years. Yet the plaintiff was held to have standing to sue to enjoin the enforcement of the state's sodomy statute.

The plaintiffs have not attempted to show that the libraries, schools, or contract printers exempted by the statute are actual or potential competitors of theirs in the sale of pornographic materials and hence that the plaintiffs are being forced to compete with entities upon which the statute has conferred a privileged status. The lack of

such a showing may appear to cast another shadow over the plaintiffs' standing to challenge the exemptions, but the appearance is deceptive. A person is allowed to point to the existence of an exemption in order to demonstrate the irrationality of a prohibition to which he is subject, even if the exemption itself does not harm him by conferring an advantage on a rival. That is a common way of making an equal protection challenge. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Orr v. Orr*, 440 U.S. 268, 272-73 (1979). It does no violence to the concept of standing. It is true that the harm to the plaintiffs that is essential to their right under Article III to maintain this suit comes not from the exemptions but from the threat of prosecution of the plaintiffs, who are not exempt. But because there is a harm to them that emanates from the statute, they have standing to maintain this suit without running afoul of Article III's limitation of the jurisdiction of the federal courts to actual cases. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1525-26 (7th Cir. 1990). The question whether the exemptions are so unreasonable as to deny the plaintiffs equal protection of the laws is a question about the merits of the constitutional challenge rather than about their right to mount such a challenge.

The state argues that the district judge should not have reached the merits—that he should have abstained under the doctrine of *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), to enable the Wisconsin courts to give the statute an interpretation that might eliminate constitutional doubts. The district judge rejected the argument in part because he could imagine no saving interpretation and in part because—a related point—he felt capable of interpreting the statute himself. Certainly from an intellectual standpoint the judge was capable of interpreting the statute, but an important difference between interpretation of a state statute by a federal court and by a state court is that only the latter interpretation is authoritative.

If the district judge had read Wisconsin's new obscenity statute so narrowly as to obviate all constitutional questions, it would still be possible for the state to prosecute people for violating the statute as broadly construed, because the enforcement of the statute would not have been enjoined. And, conversely, in a case such as this in which the district judge, having interpreted the statute, enjoins it in its entirety, he deprives the state courts of an opportunity to save at least a part of the statute by a narrowing interpretation. As a matter of comity, states ought to have that opportunity—even at the price of some delay in the winding up of litigation as the parties adjourn the federal suit to seek the guidance of the state court—unless the statute simply is not susceptible of a narrowing interpretation.

Judge Stadtmueller thought this such a case; we need not decide whether he was right. For if a challenged statute is unproblematic from a federal constitutional standpoint no matter how it is (within reason) interpreted, then there is no point in the federal district court's wasting the time of the parties and of the state court system by abstaining. *American Booksellers Ass'n, Inc. v. Hudnut*, *supra*, 771 F.2d at 327; *Mazanec v. North Judson-San Pierre School Corp.*, 763 F.2d 845, 848 (7th Cir. 1985). This is such a case, and we therefore agree, though for a reason different from that of the district judge, that abstention was not required.

The plaintiffs conceded at argument that Wisconsin's obscenity statute raises no problems under the First Amendment. That is not because the statute forbids less obscenity than the state could get away with forbidding without violating the First Amendment as construed in *Miller v. California*. It is easy to imagine a statute that would not exert the state's full power over obscenity yet would violate the First Amendment. A statute forbidding the sale of obscene books unless the book confined its depictions to procreative sex would be one. The state is permitted to suppress obscenity but it is not permitted to distort

the marketplace of erotic discourse by suppressing only that obscenity which conveys a disfavored message. It makes no difference whether this conclusion is premised on the equal protection clause as informed by policies drawn from the free-speech and free-press clauses, *Carey v. Brown*, 447 U.S. 455, 461-62 (1980), or on the speech and press clauses themselves. *Id.* at 471-72 (Stewart, J., concurring); *Arkansas Writers' Project, Inc. v. Ragland*, *supra*, 481 U.S. at 229-30; *Police Dept. v. Mosley*, 408 U.S. 92 (1972); *American Booksellers Ass'n, Inc. v. Hudnut*, *supra*.

However, a statute that exempts a particular material embodiment of obscene expression, such as videotapes, as the plaintiffs continue to insist this statute does, does not present a danger of distorting the market in ideas and expression unless particular messages are correlated with particular material embodiments, which the plaintiffs do not suggest they are. The exemptions in *Arkansas Writers' Project*, in contrast, included ones based on subject matter—for example, religious magazines were exempted from the challenged tax on publications. A statute that exempts (as Wisconsin's obscenity statute may) realistic simulations of sex, but draws the line at depictions of actual sex, does not distort the market in erotic art and entertainment either—at least no argument has been made that it does. Likewise with the exemption of contract printers, public libraries, and public and private schools and colleges: no one suggests that these entities have been exempted because they purvey a brand of obscenity (anti-Communist obscenity perhaps?) that the authorities are willing to condone because they like the point of view that informs it, or that the exemption will alter the cultural or political content of the pornography sold in Wisconsin. The reason the Wisconsin statute does not go as far as it might to prohibit obscenity is not that the statute makes value judgments among the different viewpoints reflected in obscene materials but that the forces opposed to censorship had the political muscle to force a compromise that arbitrarily, but not invidiously, limited the statute's reach.

Not every compromise obscenity statute is certain to pass muster under the First Amendment; a compromise might be motivated by concerns with the social merit of different obscene productions or, regardless of motivation, might fall unequally on different points of view. But this statute does not present these problems.

The plaintiffs argue not that the Wisconsin obscenity statute violates the First Amendment but that it is unconstitutionally vague and that the exemptions for schools, libraries, and contract printers are irrational. A criminal statute must, if it is to comport with the requirements of due process, give fair notice of its prohibitions to those persons potentially subject to it. The primary purpose of this doctrine as articulated in the modern cases is the realistic one of limiting prosecutorial discretion rather than the unrealistic one of protecting the reliance of people—for there are precious few—who actually read statutes, criminal or otherwise, before deciding whether to do something. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Waldron v. McAtee*, 723 F.2d 1348, 1354 (7th Cir. 1983); *United States v. White*, 882 F.2d 250, 252 (7th Cir. 1989). The two unsettled questions of interpretation pressed by the plaintiffs do not show that the Wisconsin obscenity law fails to provide reasonable notice of its proscriptions. Take first the question (on which the district court's decision pivots) whether the statute forbids realistic simulations of, as well as the actual "showing" of, sexual conduct. The Attorney General of Wisconsin has made the surprising concession that the statute does not forbid even the most realistic simulations. It is surprising because, with the resources of modern photographic and cinematographic technology, simulations of virtually any form of human behavior can be produced that are impossible for the viewer to distinguish from the real thing. A movie industry that can produce a shockingly realistic simulation of decapitation can produce a simulation of sexual intercourse so realistic that the viewer will believe that he is watching a movie of actual intercourse.

From the viewer's standpoint, the depiction and the simulation are identical; if one is obscene, so is the other. The qualification, "from the viewer's standpoint," may be significant, though. In the case of actual depiction, the performers are engaged in actual sex acts, presumably for money. They could, therefore, conceivably be regarded as prostitutes, *People v. Freeman*, 46 Cal. 3d 419, 758 P.2d 1128 (1988); *State v. Kravitz*, 511 P.2d 844 (Ore. App. 1973), and there is a long-standing if erratically enforced state interest in the suppression of prostitution. But except in the case of children, the draftsmen of obscenity laws do not seem particularly concerned with protecting the morals of actors and actresses.

The distinction between simulated and actual sexual activity produces further paradoxes in the case of nonpictorial obscenity. It can hardly matter whether a verbal description of sexual intercourse is a description of actual intercourse between two real people or a description of intercourse between two fictional characters. The only difference will be the names of the persons, and that will be no difference at all from the reader's standpoint if the author does not reveal whether they are real or fictional persons.

The Attorney General's concession regarding the scope of Wisconsin's new obscenity statute is so implausible that we hesitate to rely on it to dispel the ambiguity in the words, especially as he makes no representation that his concession would bind either other law enforcement officials in Wisconsin or the courts of Wisconsin. It is true that the statute itself requires the Attorney General's approval before local prosecutors can proceed against violators. Wis. Stat. § 944.21(7). But the Attorney General has not committed himself to deny approval if any is sought for a prosecution of depictions of simulated sex acts; he may change his mind about the meaning of the statute; and he may be replaced in office. And although federal courts frequently defer to state executive interpretations of state statutes, *Board of Education v. McCluskey*,

458 U.S. 966 (1982) (per curiam); *Huggins v. Isenbarger*, 798 F.2d 203, 207-10 (7th Cir. 1986) (per curiam) (concurring opinion), the question here is not whether we should defer to the Attorney General's interpretation but whether the Wisconsin Supreme Court is likely to defer to it; if we are unable to say "yes," we acknowledge the existence of an unanswered interpretive question. *Id.* at 209.

There is still no failure of fair notice. A statute may contain a serious ambiguity; this will not in itself make the statute vague. New statutes, criminal as well as civil, frequently contain ambiguities. If that alone made them unconstitutionally vague, it would be difficult to enact new statutes. The objection to vague statutes is that they invite arbitrary and discriminatory enforcement by those who administer the statute. A statute that contains one or several ambiguities that can be dispelled, at a stroke, by interpretation is not open to that objection and therefore is not vague in the constitutional sense. Either the Wisconsin statute forbids realistic simulations of sex along with actual depictions (provided of course that the simulation as well as the actual depiction is patently offensive), or it does not; once that issue is resolved by the Wisconsin courts, the ambiguity will be dispelled, the discretion of the law enforcement authorities of Wisconsin canalized.

The Attorney General's interpretation does however produce a vagueness in *application* that an interpretation of the statute as forbidding simulated as well as actual depictions of sex would not produce. Just as the consumer of pornography may not be able to distinguish an actual depiction of sexual intercourse from a highly realistic one, so a bookseller or a bookseller's clerk may be unable to make the distinction. How then is he to avoid an inadvertent violation of the statute? There are two answers, each sufficient. The first is that statutes that impose strict criminal liability are not considered unconstitutionally vague; the dilemma of the bookseller would be no different from that of a man accused of statutory rape of a girl who appears to be of age. The second is that the bookseller or clerk can be convicted under the Wisconsin statute only

if he has knowledge of the character of the material that he is selling. Wis Stat. § 944.21(3). He can always ask his supplier to certify the character of the material, and if the certification is believable and believed, he will have a haven.

Analysis of the question whether the statute covers obscene videotapes—the other question that the plaintiffs contend makes the statute unconstitutionally vague—proceeds similarly. If the statute does not include videotapes, it has an enormous loophole difficult to make sense of. A videotape is a form of recording and also a form of film (loosely understood), so there is no semantic barrier to fitting videotapes under the statute, and we can think of no plausible reason why the legislature might want to exempt videotapes. It is true that videotapes are for home viewing, and the statute disclaims regulating private sexual conduct, Wis. Stat. § 944.01, but magazines are for home reading, and the statute covers them; the statute is not limited to the public consumption of obscenity. Political explanations for the exclusion of videotapes are possible, and were hinted at in the district court, but the evidence is weak. We agree with the district judge that, on this score, the statute is not vague or ambiguous; it forbids obscene videotapes. But if this were not clear, it would just be another example of a one-shot ambiguity that will be resolved one way or the other by the Wisconsin courts, and then there will be no room left for law enforcement officials to enforce the statute unequally by interpreting it now one way, now another.

We move on to the question whether the statute denies equal protection of the laws by arbitrarily excluding libraries and schools, on the one hand, and contract printers, on the other. We think not. Libraries and schools are not in the business of purveying or exhibiting pornographic materials. They are, however, frequent targets of private citizens concerned, sometimes in an ignorant and narrow-minded way, with the exposure of their children to immoral influences. Mindless censorship, flavored with hysteria, of textbooks and of reading lists, of school libraries and of

public libraries, is an old story, Boyer, Purity in Print (1968); Haight, Banned Books (4th ed. 1978), but one with plenty of contemporary vitality. The record in this case contains newspaper articles reporting the efforts of parents to bar *The Wizard of Oz* and the *Garfield* comic strip from school libraries. The purpose of the exemption is to shield libraries and schools from groundless complaints of disseminating obscene materials, and is rational. *Commonwealth v. Ferro*, 372 Mass. 379, 361 N.E.2d 1234 (1977); *4000 Asher, Inc. v. State*, 290 Ark. 8, 13-14, 716 S.W.2d 190, 193 (1986); *M.S. News Co. v. Casado*, 721 F.2d 1281, 1291-92 (10th Cir. 1983). In holding a similar exemption unconstitutional, the court in *State v. Luck*, 353 So. 2d 225, 232 (La. 1977), overlooked the purpose of the exemption and as a result thought it groundless. The exemption is not irrational once its purpose is grasped.

No doubt it rather depreciates Wisconsin's commitment to extirpating obscenity to create an exemption of this sort; for imagine the hue and cry if Wisconsin exempted officials and employees of schools and public libraries from criminal liability for prostitution or rape. But this is a state that got along for eight years with no obscenity statute at all: the American Denmark. There are degrees of perceived criminal gravity, and apparently in Wisconsin obscenity is of not much more than zero degree. But Wisconsin can makes its own judgment about the seriousness of obscenity as a social problem responsive to criminal punishment without encountering problems under the equal protection clause, and it ill becomes pornographers to complain about the leniency of an obscenity statute.

The exemption of educational and charitable institutions from legal liability is common. Charities were long exempt from tort liability, and they remain largely exempt from property taxes. These are not exemptions from criminal liability, but such exemptions are common too. The Sherman Act, a criminal statute, is riddled with them. E.g., 15 U.S.C. §§ 17, 640, 1012(b), 1801; 46 U.S.C. § 814; *Flood v. Kuhn*, 407 U.S. 258 (1972). The existence of an exemption will rarely if ever invalidate a statute unless the dis-

tinction created by it is invidious—say a head tax from which Christians are exempt.

Contract printers may not be as worthy an object of legislative solicitude as educational and eleemosynary institutions, but neither are export associations or agricultural cooperatives or R&D joint ventures or many other beneficiaries of exemptions from criminal statutes. We have just expressed our doubts whether irrational exemptions invalidate a statute unless they create invidious distinctions between the burdened and the exempted, but if these doubts are groundless it makes no difference because the exemption of contract printers is not irrational in any sense of the word. They are low-cost, low-markup operations, in part because their employees do not attempt sophisticated assessments of the prurience or social value of the materials they print. The Wisconsin legislature arrived at a plausible judgment that the burden of criminal liability for the production of obscene materials would fall particularly heavily on contract printers and that the costs of this burden exceeded the benefits in plugging what might otherwise seem a loophole in the statute. This is the kind of judgment (no different in principle from refusing to impose liability on gun manufacturers for the criminal use of their product) that in our system is committed to state and federal legislatures rather than to federal courts, with exceptions inapplicable to this case.

Although the exemption for contract printers appears to be unique to Wisconsin, parallel exemptions, for example for nonmanagerial employees, have generally, and as it seems to us correctly, been upheld. *People v. Illardo*, 48 N.Y.2d 408, 399 N.E.2d 59 (1979). The more puzzling, although commonplace, exemption of movie projectionists (to the exclusion of other employees of movie theaters) has also been upheld. *State v. Lesieure*, 121 R.I. 859, 873-74, 404 A.2d 457, 464 (1979); *State v. Baker*, 11 Kan. App. 2d 4, 711 P.2d 759 (1985). The correctness of these decisions can be debated, *Pack v. City of Cleveland*, 1 Ohio St. 3d 129, 438 N.E.2d 434 (1982); *Wheeler v. State*, 281

Md. 593, 380 A.2d 1052 (1977), but it is enough for our purposes that the particular exemptions challenged in *this* case are rational. We add that, if the plaintiffs are customers of contract printers, they may actually benefit from that exemption, since it makes those printers' costs (which include the expected costs of any criminal liability) lower than they otherwise would be.

From language in *Carey v. Brown* and other decisions in which equal protection analysis is infused with concerns drawn from the First Amendment (most recently, *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1396 (1990)), an argument could be mounted that exemptions from obscenity statutes deserve a more searching review than they have received. But why? What is exempted is obscene, and what is not exempted is also obscene, and we cannot see why the drawing of statutory lines within a category of expression that is deemed not to be protected by the First Amendment should be inhibited by First Amendment worries, unless, to repeat an earlier qualification, the line is drawn on a forbidden basis such as the political content of the exempted materials. *Ripplinger v. Collins*, 868 F.2d 1043, 1050 (9th Cir. 1989).

The judgment is reversed with directions to dissolve the injunction and dismiss the suit with prejudice.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — ORDER OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC DATED JULY 12, 1990

In The

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

No. 89-2885

July 12, 1990

Before

Hon. Richard A. Posner, Circuit Judge

Hon. Frank H. Easterbrook, Circuit Judge

Hon. James T. Moody, District Judge*

WILLIAM H. KUCHAREK; SHANGRI-LA ENTERPRISES, INC., doing business as DENMARK BOOKSTORE; and PARADISE ONE, INC. doing business as PARADISE VIDEO STORE,

Plaintiffs-Appellees,

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* Hon. James T. Moody, of the Northern District of Indiana, sitting by designation.

Appendix B

vs.

DONALD HANAWAY, Attorney General of Wisconsin,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 88 C 657.

J.P. Stadtmueller, Judge.

ORDER

On May 21, 1990, plaintiffs-appellees filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

APPENDIX C — SECTION 944.21, WISCONSIN STATUTES (1987-88)

Section 944.21, Wisconsin Statutes (1987-88)

(1) The legislature intends that the authority to prosecute violations of this section shall be used primarily to combat the obscenity industry and shall never be used for harassment or censorship purposes against materials or performances having serious artistic, literary, political, educational or scientific value. The legislature further intends that the enforcement of this section shall be consistent with the first amendment to the U.S. constitution, article I, section 3, of the Wisconsin constitution and the compelling state interest in protecting the free flow of ideas.

(2) In this section:

(a) "Community" means this state.

(b) "Internal revenue code" has the meaning specified in s. 71.01(6).

(c) "Obscene material" means a writing, picture, sound recording or film which:

1. The average person, applying contemporary community standards, would find appeals to the prurient interest if taken as a whole;

2. Under contemporary community standards, describes or shows sexual conduct in a patently offensive way; and

3. Lacks serious literary, artistic, political,

educational or scientific value, if taken as a whole.

(d) "Obscene performance" means a live exhibition before an audience which:

1. The average person, applying contemporary community standards, would find appeals to the prurient interest if taken as a whole;

2. Under contemporary community standards, describes or shows sexual conduct in a patently offensive way; and

3. Lacks serious literary, artistic, political, educational or scientific value, if taken as a whole.

(e) "Sexual conduct" means the commission of any of the following: sexual intercourse, sodomy, bestiality, necrophilia, human excretion, masturbation, sadism, masochism, fellatio, cunnilingus or lewd exhibition of human genitals.

(f) "Wholesale transfer or distribution of obscene material" means any transfer for a valuable consideration of obscene material for purposes of resale or commercial distribution; or any distribution of obscene material for commercial exhibition. "Wholesale transfer or distribution of obscene material" does not require transfer of title to the obscene material to the purchaser, distributee or exhibitor.

Appendix C

(3) (intro) Whoever does any of the following with knowledge of the character and content of the material or performance and for commercial purposes is subject to the penalties under sub. (5):

(a) Imports, prints, sells, has in his or her possession for sale, publishes, exhibits, or transfers any obscene material.

(b) Produces or performs in any obscene performance.

(c) Requires, as a condition to the purchase of periodicals, that a retailer accept obscene material.

(4) Whoever does any of the following with knowledge of the character and content of the material is subject to the penalties under sub. (5):

(a) Transfers or exhibits any obscene material to a person under the age of 18 years.

(b) Has in his or her possession with intent to transfer or exhibit to a person under the age of 18 years any obscene material.

(5) (a) Except as provided under pars. (b) to (e), any person violating sub. (3) or (4) is subject to a Class A forfeiture.

(b) If the person violating sub. (3) or (4) has one prior conviction under this section, the person is guilty of a Class A misdemeanor.

Appendix C

(c) If the person violating sub. (3) or (4) has 2 or more prior convictions under this section, the person is guilty of a Class D felony.

(d) Prior convictions under Pars. (b) and (c) apply only to offenses occurring on or after the effective date of this paragraph . . . . [revisor inserts date].

(e) Regardless of the number of prior convictions, if the violation under sub. (3) or (4) is for a wholesale transfer or distribution of obscene material, the person is guilty of a Class D felony.

(5m) A contract printer or employe or agent of a contract printer is not subject to prosecution for a violation of sub. (3) regarding the printing of material that is not subject to the contract printer's editorial review or control.

(6) Each day a violation under sub. (3) or (4) continues constitutes a separate violation under this section.

(7) A district attorney may submit a case for review under s. 165.25(3m). No civil or criminal proceeding under this section may be commenced against any person for a violation of sub. (3) or (4) unless the attorney general determines under s. 165.25(3m) that the proceeding may be commenced.

(8) (a) The legislature finds that the libraries and educational institutions under par. (b) carry out the essential purpose of making available to all citizens a current, balanced collection of books, reference materials, periodicals, sound recordings and audiovisual materials that reflect the cultural diversity and

pluralistic nature of American society. The legislature further finds that it is in the interest of the state to protect the financial resources of libraries and educational institutions from being expended in litigation and to permit these resources to be used to the greatest extent possible for fulfilling the essential purpose of libraries and educational institutions.

(b) No person who is an employe, a member of the board of directors or a trustee of any of the following is liable to prosecution for violation of this section for acts or omissions while in his or her capacity as an employe, a member of the board of directors or a trustee:

1. A public elementary or secondary school.

2. A private school, as defined in s. 115.001(3r).

3. Any school offering vocational, technical or adult education that:

   a. Is a vocational, technical and adult education district school, is a school approved by the educational approval board under s. 38.51 or is a school described in s. 38.51(9)(f), (g) or (h); and

   b. Is exempt from taxation under section 501(c)(3) of the internal revenue code.

4. Any institution of higher education that is

accredited, as described in s. 39.30(1) (d), and exempt from taxation under section 501(c)(3) of the internal revenue code.

5. A library that receives funding from any unit of government.

(9) In determining whether material is obscene under sub. (2)(c)1 and 3, a judge or jury shall examine individual pictures or passages in the context of the work in which they appear.

(10) The provisions of this section, including the provisions of sub. (8), are severable, as provided in s. 990.001(11).

(4)

No. 90-608

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

WILLIAM KUCHAREK; SHANGRI-LA ENTERPRISES, INC., doing business as DENMARK BOOKSTORE; PARADISE ONE, INC., doing business as PARADISE VIDEO STORE; and GEM BOOKS, INC., doing business as PURE PLEASURE II BOOKSTORE,

Petitioners,

v.

DONALD J. HANAWAY, Attorney General of the State of Wisconsin,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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No. 90-608

In The

SUPREME COURT OF THE UNITED STATES

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WILLIAM KUCHAREK; SHANGRI-LA ENTERPRISES, INC., doing business as DENMARK BOOKSTORE; PARADISE ONE, INC., doing business as PARADISE VIDEO STORE; and GEM BOOKS, INC., doing business as PURE PLEASURE II BOOKSTORE,

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

SUMMARY OF ARGUMENT

I. The newly adopted Wisconsin obscenity statute draws the line between unprotected

material which is tolerated, and unprotected material which is prohibited, with constitutionally sufficient specificity.

The statute does not depart in any constitutionally significant way from the test for obscenity enunciated by this Court in Miller v. California. It faithfully follows the prescribed formula, except that it does not apply to sexual conduct which is simply simulated.

Although the statute could have been written more precisely in this respect, the Wisconsin Legislature's choice to proscribe material which "describes or shows" the "commission" of specified sexual acts, without mentioning simulated acts, in contrast to the corresponding terminology in Miller which includes simulations, demonstrates that the legislature intended to limit the scope of the state law to material which involves the actual commission of sexual conduct.

This conclusion is corroborated by the legislative history of the provision. Contemporaneous legislative memoranda reveal that the word "simulation" was deliberately deleted from earlier drafts of an obscenity statute to change the definition of obscenity to include only the actual commission of sexual conduct. This purpose was verified by a member of the conference committee which put together the ultimately enacted statute, who stated that elimination of simulated conduct was one of the compromises that allowed the diverse factions in the legislature to finally agree on a mutually acceptable obscenity law after eight years of wrangling.

A restrictive interpretation is also consistent with the manifested purpose of the legislature that the statute be used to combat the obscenity industry, but never to harass or censor materials with serious value.

The legislature's decision to limit the application of the obscenity statute to the

actual commission of sexual conduct does not create further statutory ambiguity.

The pertinent question is not whether a writing, recording, picture or film itself is a simulation of sexual conduct, but whether the sexual conduct described or shown in these media is simulated or real. The statutory line between legal and illegal sexually explicit material is the line already existing between reality and pretense, a line the publishing industry itself uses to distinguish categories of material.

The problem, consequently, is not in discerning the line drawn by the statute between unprotected material which is prohibited, and unprotected material which is tolerated, but in determining in individual instances whether specific material falls on one side or other of the line.

The difficulty in determining the side on which particular material falls, however, is no reason to hold the language of an obscenity

statute too ambiguous to define the offense. Nor is it unfair to impose a risk on one who goes dangerously close to the line that he may cross it. The mere fact that persons may reach different conclusions about the same material does not deny the right to fair notice about whether it is forbidden.

One who nears the line drawn by the Wisconsin statute, moreover, is already well into the realm of material that could be considered criminal under established first amendment principles. A person who chooses to skate out to the edge of ice that has long since become constitutionally thin has little about which to complain.

In any event, it is not problematic to compel individual purveyors of sexually explicit material to make the same assessments the publishing trade routinely makes of whether the material describes or shows the actual commission of sexual acts. And it is no more problematic to compel anyone to make

this assessment than to force them to assess whether their material appeals to a prurient interest, is patently offensive under contemporary community standards, or has serious value for society.

And ultimately, any lack of clarity about the content of material must be resolved in favor of the disseminator because of the state's burden of proof in penal cases.

Applying these principles to the examples posed by the petitioners poses little difficulty.

It is not the function of the Supreme Court to mandate regulatory schemes for the states, or to question the wisdom of the schemes for regulating obscenity they have chosen. A state statute will be sustained if it does not violate the constitution.

The due process problem with the Wisconsin obscenity statute is simply that it does not declare as clearly as it could that it applies exclusively to the actual

commission of sexual conduct. But the words carefully used in the statute, considered in the context of the history and purpose of the provision, show that the legislature intended to impose that limitation on the law. And the parties to this litigation agree that the obscenity statute is limited to actual sexual conduct.

Under these circumstances, the existing trivial ambiguity is no reason for this Court to declare a newly enacted state statute unconstitutional. Before taking such a drastic step, the federal courts should give the courts of Wisconsin a reasonable opportunity to clarify the scope of the statute.

One type of case almost universally recognized as appropriate for abstention is that of a state statute, not yet construed by the state courts, which is susceptible of one construction that would render it free from federal objection, and another that would not.

Here, however, both possible constructions of the statute are free from constitutional taint since the first amendment permits the states to proscribe both actual and simulated obscene acts. A state court need only authoritatively decide which kind of obscene acts are proscribed. This case, consequently, is even more appropriate for federal abstention than the recognized paradigm.

This Court should deny review, and allow the state courts to restrictively construe the state obscenity law the way the legislature intended, and thereby avoid the objection that it is unconstitutionally vague.

II. The different statutory treatment of different distributors of obscene material does not deprive the members of any class of equal protection.

The constitutional validity of the statutory classifications must be assessed by applying the traditional rational basis test.

The exemption for schools and libraries is rationally related to the legitimate state interest in protecting institutions of learning from harassment by persons seeking to use the obscenity law to censor works with serious value by the threat of prosecution.

The Wisconsin Legislature was as much concerned about protecting the free flow of ideas and preventing censorship of serious works as it was about combatting the obscenity industry. In Wisconsin, as elsewhere in the nation, there is periodic pressure on schools and libraries to purge their collections of constitutionally protected material which some consider morally or otherwise offensive. And the lawmakers could justifiably fear that, although obscenity litigation would not likely succeed, these institutions might succumb to a mere threat of litigation to avoid public controversy, lingering hostility and expenditure of scarce resources. Because unwarranted threats could be aimed at both

commercial and noncommercial activities of these institutions, both kinds of activity could reasonably be deemed to need protection.

The legislature could determine, on the other hand, that schools and libraries deal so little in material which is actually obscene, and engage in so little commercial activity of any kind, that the impact of their exemption on the efforts to combat the obscenity industry would be negligible. The legislature could reasonably conclude, therefore, that an effective balance between the battle against obscenity and the danger that protected material could be an innocent casualty of the battle requires that all activities of schools and libraries be insulated from efforts to misuse the obscenity statute for censorship and harassment.

The same balance does not obtain, though, for book and video dealers since they are more likely to be involved in the commercial dissemination of material which is obscene,

and are less prone to harassment and censorship by overzealous citizens.

The cases which have considered similar justifications for exempting schools and libraries from the sanctions of obscenity statutes have upheld them as rational means of protecting artistically and educationally valuable material from public censorship. None of the several authorities which have been unable to find a rational basis for such exemptions have considered the justification expressed by the Wisconsin Legislature.

The exemption for contract printing is rationally related to the state's legitimate interest in protecting the free flow of ideas from all socio-economic strata of society.

This exemption is not based merely on the fact that printers who occupy this segment of the trade lack editorial control over the material they reproduce, but on the fact that their declination to exercise editorial control allows them to print prepared

materials inexpensively, giving low and moderate income persons access to a means of disseminating their protected speech. If liability for failure to inspect were imposed on these printers, their services would necessarily become more expensive, effectively putting printing beyond the reach of the poor.

The kind of low cost, offset service offered by mostly local contract printers is not likely to be used by the obscenity industry to mass produce their glossy magazines. The legislature could have decided, therefore, that it would be better to tolerate the printing of no more than a modicum of obscene material, and thereby preserve the free flow of ideas from those with marginal access to any media, than to prohibit the printing of all obscene material, and thereby censor the dissemination of legitimate ideas by the less economically advantaged of this state.

The legislature could have concluded, consequently, that it was necessary to classify contract printers differently from others lacking editorial control over material, such as store clerks or movie projectionists, who did not share their unique role in making the first amendment right to disseminate ideas a practical reality for those who would otherwise be silenced by their poverty.

Any exemption from the obscenity statute found to be unconstitutional, moreover, could be severed, leaving a fully operative, valid law.

ARGUMENT

I. THE WISCONSIN OBSCENITY STATUTE DRAWS THE LINE BETWEEN UNPROTECTED MATERIAL WHICH IS TOLERATED, AND UNPROTECTED MATERIAL WHICH IS PROHIBITED, WITH CONSTITUTIONALLY SUFFICIENT SPECIFICITY.

A. The Language Of The Statute, Considered In The Context Of Its History And Purpose, Shows That It Applies To Material Which Describes Or Shows The Actual Commission Of Enumerated Sexual Acts.

It is important to keep in mind that this litigation involves a state obscenity statute which has not yet been enforced, and which the state courts have never had an opportunity to construe. That statute is the product of a legislative compromise, reached after eight years of wrangling, following the invalidation of its predecessor in State v. Princess Cinema, Inc., 96 Wis. 2d 646, 292 N.W.2d 807 (1980).

The attorney general recognizes that the newly cast statute, not surprisingly, still

has some rough edges. But the prohibitions intended by the Wisconsin Legislature are not so cryptic as to require a federal court to invalidate their agreement as unconstitutionally vague before the Wisconsin courts have applied their clarifying rasp.

The statute does not depart in any constitutionally significant way from the test for obscenity enunciated in Miller v. California, 413 U.S. 15, 24 (1973). Compare Wis. Stat. § 944.21(2)(c) and (d) (1987-88). The major difference between them is only that the statute does not go as far as Miller would permit, see id., 413 U.S. at 25, in banning certain kinds of offensive sexual material.

The parties appear to fully agree that the statute faithfully follows the formula of Miller, except that it does not apply to sexual conduct which is simply simulated. It applies, rather, to "a writing, picture, sound recording or film which . . . describes or

shows . . . the commission of" specified sexual acts. § 944.21(2)(c) and (e).

Although the statute could have been written more precisely in this respect, the kind of material the Wisconsin Legislature intended to prohibit, and the kind it intended to tolerate, can reasonably be discerned by comparing this language with the selected terminology in Miller the drafters chose to change.

In Miller, the Court ruled that the states could define sexual conduct to include both actual and simulated sexual acts. Id., 413 U.S. at 25. Any reference to simulated acts is conspicuously absent, however, from the Wisconsin statute's definition of sexual conduct. See § 944.21(2)(e).

Miller said that material is constitutionally obscene when it "depicts or describes" sexual conduct in a patently offensive way. Id., 413 U.S. at 24. The statute says that material is proscribed as

obscene when it "describes or shows" sexual conduct in a patently offensive way. § 944.21(2)(c)2 and (d)2. The difference, though slight, is important.

"Depict" means "represent," which in turn means to take the place of or portray, to serve as a symbol, counterpart or image. American Heritage Dictionary at 383, 1049 (2d college ed. 1982); Webster's Ninth New Collegiate Dictionary at 340, 1000 (1984). One recognized meaning is to act the part of. Webster's Ninth New Collegiate Dictionary at 1000. "Depict," therefore, connotes the notion of simulation, of mere playacting.

"Show," on the other hand, means to cause to be seen or viewed, to manifest, reveal or demonstrate. American Heritage Dictionary at 1134; Webster's Ninth New Collegiate Dictionary at 1091. "Show" connotes displaying the real thing.

By substituting "show" for "depict," consequently, the legislature indicated that

it intended to limit the scope of the state law to materials which involve real rather than simulated sexual conduct.

The same inference can reasonably be drawn from another change in the Miller phraseology. Miller suggested that sexual conduct could be defined in terms of "representations or descriptions" of particular sexual acts. Id., 413 U.S. at 25. As noted before, the word "representation" connotes simulation.

The Wisconsin obscenity statute does not use that word in its definition of sexual conduct. Instead it defines sexual conduct to mean the "commission" of particular sexual acts. § 944.21(2)(e).

"Commit" means to do, perform or perpetrate, to carry into action. American Heritage Dictionary at 298; Webster's Ninth New Collegiate Dictionary at 265. Its use in the Wisconsin definition suggests that sexual

conduct means particular sexual acts which are actually done or performed.

The parties' agreed reading of the statutory language is corroborated by the scant but instructive legislative history of the provision.[1]

In a memorandum to State Representative Marlin Schneider dated March 2, 1988, Pam Russell, a staff attorney with the Wisconsin Legislative Council, described the changes in the then-pending obscenity bill, 1987 Senate Bill 31, made by a substitute amendment drafted by the council staff. Appendix at 1-2.[2] Among other things, Russell noted that

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[1]If the words of a statute could be interpreted to support either of two meanings, a court should turn to legislative history to clarify the legislature's intent. Dixson v. United States, 465 U.S. 482, 491 (1984).

[2]A memorandum prepared by a staff member of the legislative council to accompany legislation drafted by the staff is indicative of legislative intent. See State v. Vonesh, 135 Wis. 2d 477, 486, 401 N.W.2d 170, 175 (Ct. App. 1986).

the definition of obscenity was changed by "[d]elet[ing] from the definition of sexual conduct the term 'simulation of' so that only depictions of actual commission of the various types of sexual conduct would be covered." Id. at 1.

A memorandum to State Senator Walter John Chilsen from Jane Beyer, an analyst with the Legislative Fiscal Bureau, describes the same change in the scope of the proposed law. Appendix at 3-6.

Although the particular bill to which these memos referred never became law, the absence of the word "simulated" from the obscenity statute which was enacted in a special session of the legislature three months later, see § 944.21(2)(e), convincingly implies, in light of the contemporaneous explanations of the effect of this omission, that the legislature intended that only the "actual commission of the various types of

sexual conduct would be covered" by the enacted law.

This conclusion was verified by State Representative Robert Welch, a member of the conference committee which put together the ultimately enacted statute, who stated in a later affidavit that elimination of simulated sexual conduct was one of the compromises which allowed the diverse factions in the Wisconsin Legislature to finally agree on a mutually acceptable obscenity law. Appendix at 7-8.[3]

This restrictive interpretation of the definition of obscenity is consistent with the manifested purpose of the legislature to have

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[3]The remarks of a single conferee concerning the interpretation of a statute are entitled to weight when consistent with the language and history of the law, Monterey Coal Co. v. Federal Mine Safety and Health Review Comm., 743 F.2d 589, 596 (7th Cir. 1984) (and cases cited), although post passage remarks are worthy of less weight than contemporaneous statements. Butler v. United States Dept. of Agriculture, 826 F.2d 409, 414 n.6 (5th Cir. 1987).

the obscenity statute "used primarily to combat the obscenity industry [but] never . . . used for harassment or censorship . . . against materials or performances having serious artistic, literary, political, educational or scientific value." § 944.21(1).[4] Since artistically meritorious material is more likely to portray only simulations of sexual conduct, while actual sexual acts are likely to be committed in plainly pornographic works, the legislature could well have chosen, in the spirit of compromise, to exclude simulated conduct to reduce the prospect of employing the obscenity statute to censor serious works of art.

And even if the intent of the legislature to limit the scope of the statute was not

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[4]If several interpretations of a statute are possible, a reviewing court should find the one which is most harmonious with the manifested purpose of the legislature, considering the circumstances of the enactment of the legislation. Commissioner of Internal Revenue v. Engle, 464 U.S. 206, 217 (1984).

adequately demonstrated by the process of statutory construction, the rule of lenity would apply to compel a strict construction. Tanner v. United States, 483 U.S. 107, 131 (1987); Dixson v. United States, 465 U.S. 482, 491 (1984).

B. The Difficulty In Determining Whether Individual Material In Fact Describes Or Shows The Actual Commission Of Sexual Acts Does Not Make The Legal Boundary Of The Proscribed Conduct Any Less Clear.

The legislature's decision to limit the application of the obscenity law to the "actual commission of the various types of sexual conduct" does not create further statutory ambiguity.

It is true, as the petitioners argue, that in one view "all verbal descriptions of sexual conduct are simulations." Petition for Writ of Certiorari at 8. By the same token, though, so are photographs and films. Neither

words nor pictures are themselves sexual acts. Both are merely implements for capturing the images of acts, and conveying them to those who have not observed their occurrence.

This reflection on the metaphysics of description is not relevant to the issue on this petition, however, because the Wisconsin obscenity statute does not focus on the medium, but on the message. The pertinent question is not whether the writing or recording or picture or film itself is a simulation of sexual conduct, but whether the sexual conduct described or shown in the writing, recording, picture or film is simulated or real.

Similarly, the necessary question is not merely whether the deeds described or shown by the material are actually sex acts of the kind enumerated by the state law, instead of innocuous conduct, but whether the material describes or shows the actual commission of those acts, instead of simply simulating them.

The line adopted by the legislature between legal and illegal sexually explicit material is the line already existing between reality and pretense. Furthermore, it is the natural line already adopted by the publishing industry itself between what it calls "male sophisticate" material and what it calls "explicit" material. City of Urbana ex rel. Newlin v. Downing, 43 Ohio St. 3d 109, 539 N.E.2d 140, 149 (1989).

The problem is not in discerning the line drawn by the statute between unprotected material which is prohibited, and unprotected material which is tolerated, but in determining in individual instances whether specific material falls on one side or the other of the demarcated line.

Obviously there will be particular situations in which it will be difficult to determine whether the material describes or shows persons really performing sexual acts, and is therefore forbidden, or only the

pretended performance of sexual acts, and is therefore allowed. The Court has consistently held, however, that lack of such precision does not render obscenity statutes unconstitutionally vague. Hamling v. United States, 418 U.S. 87, 111 (1974).

"Wherever the law draws a line there will be cases very near each other on opposite sides." United States v. Wurzbach, 280 U.S. 396, 399 (1930). "'"That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language [of an obscenity statute] too ambiguous to define a criminal offense."'" Hamling v. United States, 418 U.S. at 111 (quoting Roth v. United States, 354 U.S. 476, 491-92 (1957)). Accord Miller v. California, 413 U.S. at 28 n.10. "Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk

that he may cross the line." Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952).

"The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged." Miller v. California, 413 U.S. at 26 n.9. The mere fact that prosecutors, police or the purveyors of the material themselves may reach different conclusions about it does not mean that the constitutional right to fair notice is denied. See id.

It must be remembered, moreover, that the line drawn by the Wisconsin statute is not between protected and unprotected expression, but merely between two forms of unprotected obscenity. See City of Urbana ex rel. Newlin v. Downing, 539 N.E.2d at 149. See generally Miller v. California, 413 U.S. at 25 (sexual conduct may be defined to include both actual and simulated acts). One who nears the line drawn by the Wisconsin statute, consequently,

is already far into territory that could appropriately be considered criminal. By drawing the line of proscription well within the realm of obscenity, the legislature has significantly eliminated any conceivable unfairness to those who choose to skate out to the edge of ice that has long since become constitutionally thin.

If the petitioners think that the reality or simulation of the sexual conduct is "hardly the type of fact that should determine criminal liability," Petition For Writ of Certiorari at 9, they are completely free under the statutory scheme to draw the line for their own purposes, as Miller did, to include both actual and simulated acts. Then they never need worry about whether their obscene books and videos are the kind which are tolerated because the obscene conduct is only simulated, or the kind which are proscribed because the obscene conduct is actually committed.

But certainly it is not problematic to compel particular purveyors of sexually explicit material to make the same assessments that the publishing trade routinely makes of whether their wares describe or show the actual commission of sexual acts. Cf. City of Urbana ex rel. Newlin v. Downing, 539 N.E.2d at 149.

And certainly it is no more problematic to compel purveyors of sexually explicit material to assess factually whether their wares describe or show the actual commission of sexual acts than to force them to assess judgmentally whether or not the material appeals to a prurient interest, is patently offensive under contemporary community standards, or has serious value for society. See generally Miller v. California, 413 U.S. at 24 (stating test for obscenity). Yet the compulsion of those assessments does not offend the requirement of fair notice. Id. at 27.

And ultimately, any lack of clarity regarding the reality of the sexual conduct in a particular case must be resolved in favor of the person alleged to have violated the law by disseminating material describing or showing the actual commission of sexual conduct. The State of Wisconsin must prove every element of a criminal offense beyond a reasonable doubt, Turner v. State, 76 Wis. 2d 1, 10, 250 N.W.2d 706, 711 (1977), and every element of a civil offense having a criminal counterpart by clear, satisfactory and convincing evidence. City of Cudahy v. DeLuca, 49 Wis. 2d 90, 93, 181 N.W.2d 374, 375 (1970). If it does not appear to the required degree of certitude that material describes or shows the actual commission of sexual conduct, no one can be punished for disseminating obscene material. See Miller v. California, 413 U.S. at 26.

Applying these principles to the examples posed by the petitioners presents little difficulty.

A recording such as 2 Live Crew's As Nasty as They Wanna Be plainly would not be proscribed since it merely makes references to sexual parts and practices. See Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578, 591-92 (S.D. Fla. 1990). Although the recording "depicts sexual conduct in graphic detail," id. at 592, it does not "describe" the "actual commission" of the acts to which it refers.

On the other hand, an unartistic, offensively prurient "play-by-play account of [an] author's recollection of sexual intercourse" he actually committed, see Kois v. Wisconsin, 408 U.S. 229, 231 (1972), would be prohibited.

Pictorial depictions of sexual acts which do not unequivocally show that the acts are actually being committed because portions of the bodies of the participants are undiscernible or obscured, could not be

prosecuted. See City of Urbana ex rel. Newlin v. Downing, 539 N.E.2d at 149.

An obscenity statute construed to apply only to the actual commission of sexual conduct is not unconstitutionally vague.

C. This Court Should Allow The Wisconsin Courts To Construe The New Obscenity Statute In A Manner Consistent With The Agreed Intent Of The Legislature.

This Court has repeatedly emphasized that its function is not to mandate for the states specific schemes regulating obscenity. Ward v. Illinois, 431 U.S. 767, 769 (1977); Miller v. California, 413 U.S. at 25. The examples given in Miller, 413 U.S. at 25, of material a state could define as obscene were only that. Ward v. Illinois, 431 U.S. at 773. And the states remain free to define obscenity less inclusively than the constitution allows. See id. at 774.

Nor should this Court consider the wisdom of adopting a scheme less inclusive than Miller suggested. See, e.g., Caban v. Mohammed, 441 U.S. 380, 392 n.13 (1979). The due process clause does not empower a federal court to weigh the wisdom of state legislation. Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124 (1978). A statute is presumed to be valid, and will be sustained, regardless of its wisdom, if it does not violate the constitution. E.g., INS v. Chadha, 462 U.S. 919, 944 (1983).[5]

The due process problem with the obscenity statute as presently written is only that it does not declare as clearly as it could that it applies exclusively to the actual commission of sexual conduct.

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[5]This is not to concede that the line drawn by the Wisconsin Legislature was unwise. Politically, it was Solomonic. Any line can look unwise, moreover, when similar situations falling immediately on each side are compared. Considering the legislative purpose to protect even arguably serious works, the line was drawn in an appropriate place.

But as explained previously, the words carefully used in the statute, considered in the context of the history and purpose of the provision, show that the Wisconsin Legislature intended to impose that limitation on the scope of the law. And the parties to this litigation agree that the statute is limited to actual sexual conduct.

Under these circumstances, the existing ambiguity is no reason for any federal court, much less the highest one, to declare a newly enacted state statute unconstitutional. Before taking such a drastic step, the federal courts should give the courts of Wisconsin a reasonable opportunity to authoritatively clarify the reach of the new law.

The doctrine of abstention has its detractors, but also vigorous defenders, and after falling into judicial disfavor two decades ago, is once again solidly established. Waldron v. McAtee, 723 F.2d

1348, 1351 (7th Cir. 1983) (and authorities collected).

Even now, of course, abstention from the exercise of federal jurisdiction is the exception rather than the rule. City Investing Co. v. Simcox, 633 F.2d 56, 60 (7th Cir. 1980) (quoting Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976)). But abdication of the duty to decide cases can be justified in exceptional circumstances in which resort to the state courts would clearly serve an important countervailing interest. Id. (quoting Colorado River Water Conservation District v. United States, 424 U.S. at 813, and County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959)).

> "'The paradigm of the "special circumstances" that makes abstention appropriate is a case where the challenged state statute is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question.' Kusper v. Pontikes, 414 U.S. 51, 54,

> 94 S.Ct. 303, 306, 38 L.Ed.2d 260 (1973); see Zwickler v. Koota, 389 U.S. 241, 249, 88 S.Ct. 391, 396, 19 L.Ed.2d 444 (1967); Harrison v. NAACP, 360 U.S. 167, 176-177, 79 S.Ct. 1025, 1030, 3 L.Ed.2d 1152 (1959); Railroad Comm'n v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). Of course, the abstention doctrine 'contemplates that deference to state court adjudication only be made where the issue of state law is uncertain.' Harman v. Forssenius, 380 U.S. 528, 534, 85 S.Ct. 1177, 1181, 14 L.Ed.2d 50 (1965). But when the state statute at issue is 'fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question,' id., at 535, 85 S.Ct. at 1182, abstention may be required 'in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication,' id., at 534, 85 S.Ct. at 1181."

Id. (quoting Babbitt v. United Farm Workers National Union, 442 U.S. 289, 306 (1979)).

"'One type of case almost universally recognized as appropriate for abstention is that of a state statute, not yet construed by the state courts, which is susceptible of one

construction that would render it free from federal constitutional objection and another that would not.'" Waldron v. McAtee, 723 F.2d at 1352 (quoting Friendly, Federal Jurisdiction: A General View, 93 (1973)). The federal courts should avoid adjudicating such a statute unconstitutional because that determination would be "'predicated on a reading of the statute that is not binding on state courts and may be discredited at any time -- thus essentially rendering the federal-court decision advisory and the litigation underlying it meaningless.'" Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 (1987) (quoting Moore v. Sims, 442 U.S. 415, 428 (1979)). "'Such a decision not only is a waste of judicial resources but provokes a needless collision between state and federal power.'" Waldron v. McAtee, 723 F.2d at 1352 (quoting Friendly at 93).

The present circumstances offer an even more compelling case for abstention than the recognized lady and the tiger paradigm.

Unlike that paradigm, a court which is afforded the opportunity to construe this statute would not be required to choose between one constitutionally felicitous and another constitutionally perilous alternative. The first amendment permits the states to proscribe patently offensive representations of actual or simulated sexual conduct. Miller v. California, 413 U.S. at 25.[6] To avoid the constitution objection, a construing court need only determine whether the Wisconsin statute applies exclusively to one kind of

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[6]Because the present constitutional objection implicates only unprotected material, abstention would not raise concerns about interference with the plaintiffs' first amendment rights. See generally, e.g., Almodovar v. Reiner, 832 F.2d 1138, 1140-41 (9th Cir. 1987) (discussing propriety of abstention when statute affecting first amendment rights might be narrowed to make it inapplicable to protected activity).

proscribable conduct, or to both. Unlike the paradigmatic situation, therefore, either possible construction would solve the federal constitutional problem.

In these circumstances it is not just reasonably possible, but virtually certain that any subsequent construction of the statute by the state courts would discredit a federal decision that the statute was unconstitutionally vague, rendering that declaration advisory and this litigation meaningless. Meanwhile, though, that tentative declaration would provoke unnecessary friction between federal and state sovereigns, and interfere with the ability of the state to enforce its criminal laws.

When federal plaintiffs fail to present their constitutional objections to an unconstrued state statute in the state courts, the federal courts "should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the

contrary." Pennzoil Co. v. Texas, Inc., 481 U.S. at 15.

The Wisconsin courts consider it their duty to construe legislative acts attacked as unconstitutional, State v. Roth, 115 Wis. 2d 163, 166, 339 N.W.2d 807, 808 (Ct. App. 1983) (quoting State ex rel. Hammermill Paper Co. v. LaPlante, 58 Wis. 2d 32, 46-47, 205 N.W.2d 784, 792-93 (1973)), including statutes attacked as unconstitutionally vague. See, e.g., State v. Popanz, 112 Wis. 2d 166, 172, 332 N.W.2d 750, 753 (1983).[7]

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[7]In State v. Princess Cinema, Inc., the Wisconsin Supreme Court refused to further construe the former obscenity statute because that enactment contained no standards for enforcement, and the court believed it was inappropriate to establish a complete regulatory scheme through the process of judicial construction. Id., 96 Wis. 2d at 659-61, 292 N.W.2d at 814-15. While it was unwilling to completely redraft a naked obscenity statute in the face of prolonged legislative silence, however, the court reaffirmed its obligation to interpret a comprehensive legislative effort to regulate obscenity. Id.

This Court should allow the Wisconsin courts to undertake the task that, in the circumstances presented here, is appropriately theirs to perform. It should allow them to construe the Wisconsin obscenity statute, as it indisputably should be construed, to avoid the objection that it is unconstitutionally vague.

II. THE DIFFERENT STATUTORY TREATMENT OF DIFFERENT CLASSES OF DISTRIBUTORS OF OBSCENE MATERIAL DOES NOT DEPRIVE THE MEMBERS OF ANY CLASS OF EQUAL PROTECTION.

A. The Constitutional Validity Of The Statutory Classifications Must Be Assessed By Applying The Traditional Rational Basis Test.

Ordinarily, legislative classifications will be upheld if they are rationally related to a legitimate governmental purpose. Regan v. Taxation With Representation, 461 U.S. 540, 547 (1983); Clements v. Fashing, 457 U.S. 957, 963 (1982). Classifications are subject to

strict scrutiny, and upheld if necessary to promote a compelling governmental interest, only when they burden a suspect class or interfere with the exercise of a fundamental constitutional right. Id.

Classifications which interfere with the constitutionally protected right to freedom of speech are subject to strict scrutiny. Regan v. Taxation With Representation, 461 U.S. at 547. But as most courts have recognized, not all speech is protected by the constitution.

It has long been settled that obscenity is not protected by the first amendment. Miller v. California, 413 U.S. at 23; Roth v. United States, 354 U.S. at 485. Thus, classifications which do not discriminate among different kinds of protected speech, cf. Carey v. Brown, 447 U.S. 455 (1980), or separate legitimate from illegitimate speech, cf. Speiser v. Randall, 357 U.S. 513 (1958), but merely treat one group of distributors of unprotected obscene speech differently from

another group of distributors of unprotected obscene speech, do not interfere with the exercise of any protected right. E.g., Ripplinger v. Collins, 868 F.2d 1043, 1049-50 (9th Cir. 1989); United States v. Freeman, 808 F.2d 1290, 1293 (8th Cir.), cert. denied, 480 U.S. 922 (1987); Piepenburg v. Cutler, 649 F.2d 783, 787 (10th Cir. 1981); Pollitt v. Connick, 596 F. Supp. 261, 267 (E.D. La. 1984); U.T., Inc. v. Brown, 457 F. Supp. 163, 166 (W.D.N.C. 1978); 4000 Asher, Inc. v. State, 290 Ark. 8, 716 S.W.2d 190, 192 (1986); State v. Baker, 11 Kan. App. 2d 4, 711 P.2d 759, 762-63 (1985) (and cases collected); 400 East Baltimore Street, Inc. v. State, 49 Md. App. 147, 431 A.2d 682, 694 (1981), cert. denied, 455 U.S. 940 (1982); Commonwealth v. Ferro, 372 Mass. 379, 361 N.E.2d 1234, 1236-37 (1977); Pack v. City of Cleveland, 1 Ohio St. 3d 129, 438 N.E.2d 434, 438 (1982); Long v. 130 Market Street Gift and Novelty, 294 Pa. Super. 383, 440 A.2d 517, 523-24 (1982); State

v. Lesieure, 121 R.I. 859, 404 A.2d 457, 463 (1979); State v. Hunt, 660 S.W.2d 513, 517 (Tenn. Crim. App. 1983), cert. denied, 466 U.S. 944 (1984).

The classifications attacked in this litigation must be assessed, therefore, under the traditional rational basis test. Id.

That test allows states considerable leeway to enact legislation which may appear to affect similarly situated people differently. Clements v. Fashing, 457 U.S. at 962-63; Parham v. Hughes, 441 U.S. 347, 351 (1979). Legislators are ordinarily presumed to have acted constitutionally, and the distinctions they deem desirable need only be drawn in such a manner as to bear some rational relationship to a legitimate state interest. Clements v. Fashing, 457 U.S. at 963; Parham v. Hughes, 441 U.S. at 351.

> "'If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or

> because in practice it results in some inequality." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 [(1911)]. "The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific." Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70 [(1913)]. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426 [(1961)].' Dandridge v. Williams, 397 U.S. [471,] 485 [1970]."

Bowen v. Gilliard, 483 U.S. 587, 600-01 (1987). Accord Clements v. Fashing, 457 U.S. at 963.

B. The Exemption For Schools And Libraries Is Rationally Related To The Legitimate State Interest In Protecting Institutions Of Learning From Harassment By Persons Seeking To Use The Obscenity Law To Censor Works With Serious Value.

The Wisconsin Legislature, knowing full well the constitutional problems presented, has chosen to exempt directors and employees

of schools and public libraries from liability under the state obscenity statute. § 944.21(8).

The question presented by this choice is not whether the legislature decided wisely to make the obscenity statute less comprehensive than it might have been, but whether its considered decision to immunize certain institutions from the same penalties as others for commercially disseminating obscene material was rational.

The fact that it took eight years after the old obscenity statute was struck down in State v. Princess Cinema, Inc., to enact a new one demonstrates that the legislature did not take its task lightly. It was as much concerned about protecting the free flow of ideas and preventing censorship of works having serious literary, artistic, political, scientific and educational value as it was about combatting the obscenity industry. § 944.21(1). And it is no secret that in

Wisconsin, as elsewhere in the nation, there is periodic pressure on schools and libraries to purge their collections of unqualifiedly serious works which some individuals or groups consider morally or otherwise offensive.

An article in the Milwaukee Journal, Sept. 26, 1988, at 4B, col. 1, Appendix at 9, reported the results of a survey showing that more than one hundred books were attacked in Wisconsin schools and libraries during the years since the Princess Cinema decision in 1980 left the state without an enforceable obscenity law. During these years in which the legislature was debating whether to enact a new statute, challenges were made in almost every Wisconsin county, and included a complaint about a volume of the World Book Encyclopedia of Science. Id.

A national survey of censorship efforts against schools and libraries during the 1988-89 academic year, reported in the Milwaukee Journal, Sept. 10, 1989, at 7J, col.

1, Appendix at 10, showed that Wisconsin was among the many states in which books continued to be challenged. Materials which were subject to objection included not only the perennial targets, Of Mice and Men, Slaughterhouse Five and Catcher in the Rye, but also such seemingly innocuous works as The Wizard of Oz and the comic strip, Garfield. Id. Nearly half the reported challenges resulted in either removal of the material or restrictions on its availability. Id.

Wisconsin lawmakers could reasonably conclude they did not want an obscenity statute to be used as a tool by pressure groups to harass public institutions into censoring plainly protected materials under the threat of prosecution. They could justifiably fear that, although such litigation would not likely succeed, these institutions might succumb to avoid the public controversy, lingering hostility and expenditure of scarce resources even an

unsuccessful prosecution would involve. See § 944.21(8)(a).

Since unwarranted pressure could be brought to discontinue any commercial as well as noncommercial dissemination of protected material some groups found objectionable, the lawmakers could reasonably decide to exempt both the commercial and noncommercial activities of vulnerable institutions to free them from the exacerbated harassment which could be provoked by the new enactment.

In addition, the legislature could reasonably fear that would-be censors would use the prospect of liability for commercial dissemination of obscenity to harass schools and libraries by arguing that their lending activities were commercial because they purchased their books and paid their employees, or because they received tax support. Such arguments would not likely prevail in litigation any more than an argument that Catcher in the Rye is obscene.

The danger that the mere threat of litigation for alleged commercial activity, regardless of the reality of success, might lead to suppression or restriction of protected material with serious value justifies an exemption for commercial activity.

The obscenity statute is aimed primarily at commercial distribution of obscene material, moreover, § 944.21(1), (3), and the legislature could determine that schools and libraries deal so little in material which is actually obscene, and engage in so little commercial activity involving any kind of material, that the impact of their exemption on the efforts to combat the obscenity industry would be negligible.

The legislature could reasonably conclude, consequently, that the danger to the free flow of valuable ideas if schools and libraries were included among those subject to prosecution for distributing obscenity far outweighed the danger from any commercial

distribution of obscenity if they were excluded. They could reasonably conclude that an effective balance between the battle against obscenity and the danger that protected material could be an innocent casualty of that battle required that all activities of schools and libraries be insulated from efforts to misuse the obscenity statute to harass these institutions, and censor works with serious value.

This balance does not obtain, however, for book and video stores.

Although these dealers also promote the free flow of ideas in society, they do not promote the flow for free. They, much more than schools or libraries, are engaged in the commercial dissemination of material. At least some stores, moreover, those euphemistically specializing in "adult" material, are more likely to deal in material which is legally obscene. These inherently commercial enterprises, therefore, present a

significantly greater danger of commercial dissemination of obscene material.

In addition, book and video dealers have been much less prone to harassment and censorship by citizens who seem to consider tax supported institutions and employees necessarily subservient to their personal tastes. Not many have tried to pull John Steinbeck's novels or Judy Garland's movies from stores where they are for sale. These private enterprises, therefore, face significantly less danger of being victimized by the opposing problem the legislature sought to avert.

Bookstores and video dealers are situated differently from schools and public libraries. And the legislature could properly treat them differently by exempting the one class but not the other from the obscenity statute.

The cases which have considered similar justifications for exempting schools and libraries from the sanctions of obscenity

statutes have upheld the classifications as rationally related to the legitimate state interest in protecting artistically and educationally valuable material from public censorship. 4000 Asher, Inc. v. State, 716 S.W.2d at 192-93; 400 East Baltimore Street, Inc. v. State, 431 A.2d at 691-94; Commonwealth v. Ferro, 361 N.E.2d at 1236-37; State v. Martin, 719 S.W.2d 522, 525 (Tenn. 1986). None of these cases limits its approval of the exemptions to the noncommercial activities of schools and libraries. See id.[8]

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[8]The exemption approved in Commonwealth v. Ferro expressly included a "'retail outlet affiliated with and serving the educational purpose of [the exempt] organization.'" Id., 361 N.E.2d at 1236.

The cases which rely on other justifications for approving school and library exemptions do not by and large limit their imprimaturs to the noncommercial activities of these institutions, except in those jurisdictions in which the obscenity statutes in question limit their exemptions in this way. E.g., Long v. 130 Market Street

(continued...)

None of the several authorities relied on by the petitioners which have been unable to find a rational basis for exempting schools and libraries from other obscenity statutes, Petition for Writ of Certiorari at 14, have considered the justification expressed by the Wisconsin Legislature for excluding schools and libraries from this statute. These authorities, therefore, are beside the point, and offer no support for the claim that the exemptions in § 944.21 are irrational as they apply to commercial activities of public institutions.

The exemptions, to the contrary, are rationally related to the legitimate state interest in protecting institutions having a public purpose from harassment by persons

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[8](...continued)
Gift and Novelty, 440 A.2d at 527-28. Other cases approve exemptions for all activities of institutions which by and large engage in noncommercial activities. M.S. News Co. v. Casado, 721 F.2d 1281, 1291-92 (10th Cir. 1983).

seeking to use the obscenity law to censor nonobscene works with serious social value. They do not deny equal protection, consequently, to persons or institutions denied their benefit.

C. The Exemption For Contract Printing Is Rationally Related To The State's Legitimate Interest In Protecting The Free Flow Of Ideas From All Socio-Economic Strata Of Society.

There is a rational basis for exempting contract printers from penal liability for "the printing of material that is not subject to the contract printer's editorial review or control." § 944.21(5m).

The exemption for contract printing is not based merely on the fact that printers who occupy this segment of the trade lack editorial review or control over the material they reproduce, but on the fact that their declination to exercise editorial control allows them to print prepared materials

inexpensively, giving low and moderate income persons and groups meaningful access to a means of disseminating their protected speech.

As noted previously, the Wisconsin Legislature was legitimately concerned with battling the obscenity industry, but not at all costs. § 944.21(1). It was equally concerned with "protecting the free flow of ideas," id., and "making available to all citizens . . . materials that reflect the cultural diversity and pluralistic nature of American society." § 944.21(8)(a).

The legislature could reasonably find, as the Wisconsin Supreme Court did earlier, that "contract printers . . . provide[] a quick and inexpensive printing service that by its low cost allows access to the print media by groups that would otherwise not find such access." Maynard v. Port Publications, Inc., 98 Wis. 2d 555, 567, 297 N.W.2d 500, 507 (1980).

The reason for the low cost of the printing, and hence its availability to low and moderate income groups, is that contract printers typically accept material which has been written, edited, typeset and laid out by others, and merely reproduce it on their photo-offset printing machinery. Id. at 556-57, 567-68, 297 N.W.2d at 502, 507. Contact with the content of the material is negligible because there is no need for a contract printer to read or check the material in any way before it is reproduced. Id. at 568, 297 N.W.2d at 507.

The legislature, like the court, could have reasoned that:

> If liability for failure to inspect were imposed on printers like Port, they would of necessity become censors and their services would become more expensive. Increased costs might preclude the publication of small, low-budget newspapers. Such potential liability might also deter contract printers from contracting to print material they consider to be controversial. All of this would have a deleterious effect on the free dissemination of

> information which is fundamental in our society.

Id. at 567, 297 N.W.2d at 507.

Consistent with this reasoning, the statute is careful to specify that contract printers have immunity only for the "printing" of material which might be obscene. § 944.21(5m). Since "printing" includes only the reproduction of material in printed form, American Heritage Dictionary at 985, Webster's Ninth New Collegiate Dictionary at 935, this exemption does not permit the reproduction of films or of videotapes which are now becoming the dominant mode of presenting pornographic material. See generally 1 Attorney General's Commission on Pornography, Final Report, § 4.2.2 at 287-89 (1986).

The kind of low cost, offset service offered by mostly local contract printers, moreover, is not likely to be used by the obscenity industry to mass produce their glossy magazines. Contract printers,

consequently, could empirically be considered to present a minimal threat of becoming a cog in the obscenity industry.

The legislature could have reasonably decided that its purpose to prevent the printing of obscene material was outweighed in this instance by its purpose to protect the free flow of material with serious value to all segments of society. It could have decided that it would be better to tolerate the printing of perhaps a modicum of obscene material, and thereby preserve the free flow of ideas from those with marginal access to the media, than to prohibit the printing of all obscene material, and thereby effectively censor the dissemination of serious literary, artistic, political, scientific and educational ideas by the less economically advantaged of this state.

The legislature could have concluded, consequently, that it was necessary to classify contract printers differently from

others lacking editorial review or control over material, such as store clerks or movie projectionists, who did not share their unique role in making the first amendment right to disseminate ideas a practical reality for those who would otherwise be silenced by their poverty.

The exemption for contract printing is reasonably drawn to accommodate the important state interest in preserving the free flow of ideas from all its citizens without surrendering too much ground in its war against the obscenity industry.

D. Any Exemption From The Obscenity Statute Found To Be Unconstitutional Could Be Severed, Leaving A Fully Operative Valid Law.

> "[A] court should refrain from invalidating more of the statute than is necessary. . . . '[W]henever an act . . . contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is

> valid.'" The standard for determining the severability of an unconstitutional provision is well established: "'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'"

Alaska Airlines v. Brock, 480 U.S. 678, 684 (1987) (citations omitted).

The Wisconsin Legislature was given plain notice that exemptions would be constitutionally troublesome. It chose to include three of them anyway. But by adding that, "[t]he provisions of this section, including the provisions of sub. (8), are severable, as provided in s. 990.001(11)," § 944.21(10), the legislature evinced a clear intent that the substantive provisions of the statute should stand if any or all of the exemptions should be found unconstitutional.

The exemptions for schools, public libraries and contract printers are obviously independent of the substantive provisions of

the law. Severing the exemptions, therefore, would have no effect whatever on the nature of the statutory prohibitions.

If any of these exemptions are found to be unconstitutional, therefore, they should be severed in accord with the expressed intent of the legislature, leaving a fully operative law which could be enforced to fulfill the primary legislative purpose of fighting the obscenity industry.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DONALD J. HANAWAY
Attorney General

THOMAS J. BALISTRERI
Assistant Attorney General

Attorney of Record for Respondent

Wisconsin Department of Justice
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APPENDIX

WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Room 147 North, State Capitol, Madison 53702
Telephone (608) 266-1304

DATE: March 2, 1988

TO: REPRESENTATIVE MARLIN D. SCHNEIDER

FROM: Pam Russell, Staff Attorney

SUBJECT: Description of Senate Substitute Amendment __ (WLCS: 337/1) to 1987 Senate Bill 31, Relating to Obscenity

Senate Substitute Amendment __ (WLCS: 337/1) to 1987 Senate Bill 31, relating to obscenity, makes the following changes to Senate Bill 31:

1. Specifies that the transactions subject to criminal penalties are only (a) enumerated transactions carried out for commercial purposes and (b) transactions involving minors.

2. Deletes advertising obscene material or an obscene performance as a transaction that may be subject to criminal prosecution.

3. Provides a statement of legislative intent that the authority to prosecute obscenity is to be used primarily to combat the obscenity industry and not to be used for harassment or censorship purposes and that enforcement should be consistent with constitutional free speech protections.

4. Makes the following changes in the definition of obscenity under the Bill:

a. Permits a court to consider whether the material or performance has serious educational value.

b. Deletes from the definition of sexual conduct the term "simulation of" so that only depictions of actual commission of the various types of sexual conduct would be covered under the definition of obscene.

(OVER)

c. Specifies that "community standards" under the definition of obscenity are statewide standards.

5. Requires that, prior to bringing a criminal action for a violation of the state obscenity law, the Attorney General must determine whether a criminal action shall be commenced.

6. Authorizes counties to adopt ordinances to prohibit conduct that is the same as the obscenity statute. The county is not required to consult with the Attorney General prior to bringing an action for violation of the ordinance.

7. Specifies that cities, villages and towns may not enact obscenity ordinances.

8. With regard to the requirement that a defendant must have knowledge of the character and content of the material or performance, specifies that the general definition of "knowledge" applicable throughout the Criminal Code (i.e., that knowledge only requires a belief that the actor believes that the specified fact exists) does not apply to the obscenity statute.

9. Creates an exemption from prosecution under the obscenity statute for employes, members of the board of directors or trustees of libraries and educational institutions, if those persons are acting in their official capacities.

10. Specifies that the provisions of the substitute amendment, including the exemption for libraries and educational institutions, are severable.

PR:kja;las

March 4, 1988

TO: Senator Walter John Chilsen
Room 40 South, State Capitol

FROM: Jane Beyer, Fiscal Analyst
Legislative Fiscal Bureau

SUBJECT: Senate Substitute Amendment WLCS 337/1 to Senate Bill 31

At your request, I am providing a summary of Senate Substitute Amendment WLCS 337/1 to Senate Bill 31, which would make a number of modifications to the bill relating to obscene materials and performances.

Definition of Obscenity

Under Senate Bill 31, obscene material would be defined to mean a writing, picture, sound recording or film which meets the following three criteria:

1. The average person, if he or she would apply contemporary community standards, would find the material appeals to prurient interests, if taken as a whole;

2. Under community standards, the material describes or shows sexual conduct in a patently offensive way; and

3. The material lacks serious literary, artistic, political or scientific value, if taken as a whole.

Obscene performance would be defined under SB 31 to mean a live exhibition before an audience which meets the following three criteria:

1. The average person, if he or she would apply contemporary community standards, would find the performance appeals to prurient interests, if taken as a whole;

2. Under community standards, the performance describes or shows sexual conduct in a patently offensive way; and

3. The performance lacks serious literary, artistic, political or scientific value, if taken as a whole.

The substitute amendment would specify that the "community standards" under the definitions of obscene material and performances would be statewide standards. The substitute amendment would further require that, in addition to a finding that the material or performance lacks serious literary, artistic, political or scientific value, if taken as a whole, it lacks educational value as well.

Senate Bill 31 would define sexual conduct to mean the commission or simulation of any of the following: sexual intercourse, sodomy, bestiality, necrophilia, human excretion, masturbation, sadism, masochism, fellatio, cunnilingus or lewd exhibition of human genitals. The substitute amendment deletes from the definition of sexual conduct the term "simulation of" so that only depictions of actual commission of the various types of sexual conduct specified would be covered under the definition of obscene.

Types of Transactions Prohibited; Penalty

Under the provisions of Senate Bill 31, it would be a Class D felony to do any of the following with knowledge of the character and content of the material or performance: (1) import, print, advertise, sell, possess for sale, publish, exhibit or commercially transfer any obscene material; (2) advertise, produce or perform in any obscene performance; (3) possess obscene material with the intent to transfer or exhibit the material to a person under the age of 18 years; or (4) transfer or exhibit any obscene material to a person under the age of 18 years. Further, it also would be a Class D felony to require, as a condition to the purchase of periodicals, that a retailer accept obscene material. A Class D felony is punishable by a fine not to exceed $10,000 or imprisonment not to exceed five years, or both.

The substitute amendment would delete advertising obscene materials or performances as transactions that could be subject to prosecution. The substitute amendment would limit the types of prohibited transactions involving obscene materials and performances to include only the enumerated transactions carried out for commercial purposes. The transactions involving minors, which would be prohibited under the bill, would also be prohibited under the provisions of the substitute amendment, regardless of whether they would be carried out for commercial purposes. The substitute amendment would provide that a violation of the obscenity statute is a Class D felony and further, would specify that each day a violation of the obscenity provisions continues would be a separate offense.

Legislative Intent

A statement of legislative intent is included in the substitute amendment which provides that the authority to prosecute obscenity is to be used primarily to combat the obscenity industry and is not to be used for harassment or censorship purposes against materials or performances having serious artistic, literary, political, educational or scientific value. The

intent statement further provides that enforcement of the obscenity provisions should be consistent with constitutional free speech protections. Senate Bill 31 does not include a statement of legislative intent.

Knowledge Requirement

The provisions of Senate Bill 31 would apply to persons who engage in various actions involving obscene material or performances with knowledge of the character and content of the material or performance. Under a general statutory provision [s. 939.23(2)] relating to criminal intent, "know" is defined to require only that the actor believes that the specified fact exists. This statutory definition of knowledge would not apply to knowledge of the character and content of the material or performance under the substitute amendment.

Exemption from Prosecution for Libraries and Educational Institutions

The substitute amendment would create an exemption from prosecution under the obscenity statute for employes, members of the board of directors or trustees of libraries and educational institutions, if those persons are acting in their official capacities. Senate Bill 31 does not contain such an exemption.

Prosecutorial Authorization of the Attorney General

The substitute amendment would also create the requirement that, before any criminal obscenity law prosecution is commenced, the district attorney must submit the case for review by the Department of Justice. District attorneys could only begin prosecution with the authorization of the Attorney General. (It should be noted that the WLCS 337/1 draft appears to provide the authority to determine whether obscenity cases should be prosecuted to the Department of Justice generally, rather than the Attorney General specifically. The Legislative Reference Bureau draft of the substitute amendment to SB 31 clarifies this point to specify that it would be the responsibility of the Attorney General specifically to authorize such prosecutions.)

Local Regulation

The substitute amendment would allow counties to adopt ordinances to prohibit conduct that is the same as that conduct which would be prohibited under the state statute. Such ordinances could provide for a forfeiture not to exceed $10,000 for each violation. The county would not be required to consult with the Attorney General prior to beginning an action for violation of the ordinance. Further, the substitute amendment would specify that cities, villages and towns may not enact obscenity ordinances.

Severability of the Provisions

The substitute amendment specifies that the provisions of the substitute amendment, including the exemption for libraries and educational institutions, are severable.

Determinations Regarding Obscenity

Senate Bill 31 would require that a judge or jury examine pictures or passages in the context of the work in which they appear in determining: (a) whether the average person, if he or she would apply contemporary community standards, would find the material appeals to prurient interests if taken as a whole, and (b) whether the material lacks serious literary, artistic, political or scientific value, if taken as a whole, and is therefore, obscene. The substitute amendment would retain this provision.

I hope this summary is useful. Please contact me if I can be of further assistance.

JMB/all

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 88-C-657

WILLIAM H. KUCHAREK, et al.,

Plaintiffs,

v.

DONALD J. HANAWAY,

Defendant.

AFFIDAVIT OF STATE REPRESENTATIVE
ROBERT WELCH

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

ROBERT WELCH, being duly sworn, states on oath that:

1. He is a Wisconsin state representative and member of the Wisconsin Legislature.

2. He was a member of the conference committee which put together November 1987 Special Session Assembly Bill 10, which ultimately was passed and signed by the governor to become 1987 Wisconsin Act 416, creating the present Wisconsin obscenity statute, Wis. Stat. § 944.21 (1987-88).

3. One of the compromises agreed to by the conference committee was the elimination of simulations of sexual conduct from the scope of the bill.

4. The intent of the committee was to limit the scope of the obscenity statute to material which describes or shows the actual commission of sexual conduct.

ROBERT WELCH
State Representative

Subscribed and sworn to before me
this 20th day of June, 1989.

Notary Public, State of Wisconsin
My commission is permanent.

4 B THE MILWAUKEE JOURNAL Monday, September 26, 1988

Efforts to ban books rising, survey shows

Stevens Point, Wis. —AP— A professor who has studied censorship for more than 25 years says he sees an increase this year in efforts to ban books from public libraries and schools.

Lee Burress, a University of Wisconsin-Stevens Point English professor, said evidence from a fifth nationwide survey he is conducting suggests that there is an increase in the state and nation.

In a survey two years ago, Burress identified more than 100 books that have been challenged in Wisconsin since 1980.

Books have been attacked by concerned parents or adults in almost every county in Wisconsin, Burress said, but the state is about average when the number of banning attempts is compared with national averages.

He said Wisconsin's new anti-pornography law could mean a rise in book-banning attempts. The law, enacted in June, outlaws the sale or exhibition of hard-core obscene materials and provides for fines and jail terms.

Although the law exempts schools and libraries, Burress said he expected it would nonetheless encourage more frequent challenges of books on the shelves of public and school libraries.

Burress, a member of the Wisconsin Intellectual Freedom Coalition, testified against enactment of the law at public hearings earlier this year.

"The net effect will probably be chilling. I do think there will be more problems because of the law. Schools will be under more pressure," he said.

Burress said the most frequent reason cited by parents and groups who sought to ban books from schools was obscenity. He said the state's new law likely would be used by those groups.

Kathleen Huston, chairwoman of the Wisconsin Library Association's intellectual freedom committee, said she too feared the obscenity law would encourage more attempts to ban books from libraries.

"I think that it was a step backward for the state," she said.

Burress said recent examples illustrated a problem with book banning efforts, mainly that there is no clear definition of obscenity. "The general public uses that term in a very loose, sloppy way," he said.

The book "Working" by Studs Terkel was challenged by parents in Wales who objected to language they considered obscene.

In Evansville, a controversy erupted last year over "Woman's Body: An Owner's Manual." Parents said the book contained "filth" and was "sick."

Huston said the most recent complaint she received was about a book at an elementary school in Antigo. The book, "The Human Body," was a volume of the World Book Encyclopedia of Science used by third- and fourth-graders.

"There was concern," Huston said, "about a section of the book that dealt with the reproductive system. It had the typical color overlays of the male and female reproductive systems.

"The complaint was that the book would get the children too confused and frightened about something they were too young to understand," she said.

Burress said, however, that he is encouraged by the fact that most school boards in Wisconsin have established guidelines for dealing with complaints about books.

"It is a dangerous world out there," Burress said. "And I am sympathetic with parents who want to protect their kids. At the same time, I don't think you can protect them by preventing them from reading."

Would-be censors challenge libraries

By JOHN BARBOUR
Associated Press

More than 40 million public school children and 13 million college students have returned to their classrooms. But in many of these halls of learning, the shadow of censorship hangs over that source of light and knowledge, the library.

Freedom of speech and the press, to write and to read whatever you like, remains protected in America. But those freedoms are frequently challenged. Public and school librarians often feel under siege.

Books as seemingly harmless as Mark Twain's "Huckleberry Finn" and L. Frank Baum's "The Wizard of Oz" have been challenged. Some of the most frequent targets are John Steinbeck's "Of Mice and Men," Kurt Vonnegut's "Slaughterhouse Five" and J.D. Salinger's "Catcher in the Rye."

But, as the school board in Eliot, Maine, said in rejecting a parental request to ban Judy Blume's novel "Forever" as pornographic: "While you have the right to censor material for your child, we do not believe you have that right for other children in the system."

One report issued last month said religious extremists and right-wing organizations were gaining in their battle to ban or censor library books.

The report was by People For the American Way, an anti-censorship group founded by television producer Norman Lear. The organization's 7th annual report, "Attacks on the Freedom to Learn," said censorship and other ideological attacks on public education occurred in 42 of the 50 states, including Wisconsin.

The report said school libraries were the target of significantly more censorship attempts during the 1988-'89 school year, with more than half the challenges made against materials that are not required reading but are available in the library.

Nearly half the challenges covered by the report resulted either in removal of the material or in restrictions on its use, such as a requirement of prior parental consent.

In the 1986-'87 academic year, People For the American Way reported 153 attempts to remove books from public schools or libraries in 41 states, 37% of them successful.

Judith Krug, who writes and edits the American Library Association's Newsletter on Intellectual Freedom, chronicles those individuals and groups "who attempt to remove those materials from public availability and accessibility."

"This is a constitutional republic, but the constitutional republic does not work unless the electorate is enlightened," she said. "We are a nation of self-governors, but in order to make appropriate decisions we need to have information available and accessible."

Soon, authors and celebrities will visit bookstores and libraries across the country to read publicly excerpts from banned books, as they did when Salman Rushdie's "The Satanic Verses" raised such a furor.

In Los Angeles, for instance, PEN Center West, an author's group, will meet in Malibu for readings of banned books. Among the invited are Steve Allen, Alice Walker, Martin Sheen, Ray Bradbury, Hope Lange, Alvin Toffler, Larry King and Billy Crystal.

In the year ended May 1989, the American Library Association reported that more than 100 books were brought up on charges, including Jim Davis' "Garfield: His Nine Lives."

That cartoon book was challenged in Saginaw, Mich., by a parent who found some of the language and drawings offensive. Said Stephen James, assistant director for the Saginaw County Public Library, "It was intended to be a children's book. But some of the language was challenging."

A parent objected to one illustration Davis had captioned, "She stormed, she fumed, she kicked ass." The drawing depicts a woman kicking a man and sending him tumbling.

The library review committee decided to keep the book, but in the adult section.

It has been a rough time for James and the Saginaw libraries. They received 11 challenges from May to December 1988.

The Saginaw authorities reported to the library association: "Although no evidence of an organized censorship effort has been found as yet ... the sheer number of challenges placed a clear burden on the library and to many seemed to suggest further trouble."

Saginaw received a complaint because the Bible and books on Christianity were shelved with books on myths and other religions, but that is where the Dewey Decimal System places them.

What about a picture book for children — named "Where's Waldo?" — in which young readers scan through a busy page of a hundred or so small illustrations of tiny characters to find Waldo? He is either lost in the illustrations of people doing things at a track meet or a department store.

But among the illustrations, one woman found a little boy peeking under a curtain at a woman in a department store dressing room. As in the other cases, the review committee refused to ban the book.

And Saginaw was asked to remove a book called "Young, Gay and Proud," an anthology of short stories, poems and essays supportive of teenagers who have homosexual tendencies.

The complaint was filed by David A. Morel, the father of two young girls and a vice president of the 25-member Saginaw chapter of the American Family Association, a religiously oriented group based in Tupelo, Miss., formerly known as the National Federation for Decency.

Morel, a church-going Baptist, objected to the book on pornographic grounds.

The library reviewers rejected his appeal. "We felt, in fact, it was not enticing youngsters, that it was intended to promote a sort of healthy self-image and that in fact was a good thing to do once a person had made a personal decision," James said. "We decided to keep it in the collection."

It is only one of some 400,000 books in the five Saginaw libraries. But it is part of the diversity of books that can be found in any public library.

"Many Voices, Many Books: Strength Through Diversity" is the theme of National Banned Books Week, Sept. 23-30, sponsored by the library association. "There are a lot of ideas out there I don't agree with," said Krug, the association's guardian. "But I don't think you can fight ideas unless you know what they are. The solution to a bad idea is a good idea, and ideas do build on one another."

Libraries once practiced a concept of balance, both sides of a controversy. But those were simpler days, when there were only two sides. Things are so complex, opinions so varied, that librarians now embrace the concept of diversity.

At the base of many current censorship attempts is the Supreme Court ruling that upheld the right of a Missouri school board to censor a student newspaper. The extension of that ruling to school libraries is being tested in Florida.

Despite the constant battle to preserve the sanctity of the shelves, the passion for censorship continues unabated.

In Louisville, Colo., an elementary school banned Halloween when parents said it promoted devil worship. The ban was lifted when other parents protested that it was depriving their children of enjoyable activities.

But in North Pole, Alaska, named after Santa's home base, a school banned the use of the word Christmas in the holiday season on the basis that it violated the separation of church and state. The ban remains.

No. 90–608

In The

Supreme Court of the United States

October Term, 1990

WILLIAM H. KUCHAREK; SHANGRI–LA ENTERPRISES, INC., doing business as DENMARK BOOKSTORE; PARADISE ONE, INC., doing business as PARADISE VIDEO STORE; AND GEM BOOKS, INC., doing business as PURE PLEASURE II BOOKSTORE,

Petitioners,

vs.

DONALD J. HANAWAY, Attorney General of the State of Wisconsin,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE CHILDREN'S LEGAL FOUNDATION, NATIONAL FAMILY LEGAL FOUNDATION, AND MORALITY IN MEDIA OF WISCONSIN, INC. IN OPPOSITION OF THE PETITION FOR WRIT OF CERTIORARI

JAMES P. MUELLER
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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Children's Legal Foundation, Inc. (CLF), National Family Legal Foundation and Morality in Media of Wisconsin, Inc., respectfully move for leave to file the attached brief amici curiae. The written consent of the attorney for Respondents has been obtained. The consent of the attorney for Petitioners was requested telephonically and consent was refused.

The interest of the amici curiae is set out below.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

Children's Legal Foundation, Inc. (CLF), formerly Citizens for Decency through Law, Inc., is a non-profit legal organization founded in 1957. The Foundation exists to assist public officials in the enforcement and drafting of constitutional obscenity and child pornography laws. It also provides legal assistance to victims of pornography, especially child victims. CLF provides public information on legal and social issues related to pornography, and on sexual exploitation and victimization by pornographers. The Foundation has a legal staff of attorneys practicing exclusively in the First Amendment/pornography area. CLF has filed more that 50 amicus curiae briefs with the United States Supreme

Court on virtually every major obscenity and child pornography issue before it in the past three decades. CLF attorneys have participated in trials and appeals in more than 40 states. It has more than 120 affiliated chapters across the nation representing approximately 100,000 supporters.

National Family Legal Foundation is also a public interest organization, providing legal assistance to individuals, organizations, prosecutors and other public officials concerned about the harmful impact of pornography on the quality of life. The Foundation's Executive Director Alan E. Sears is the former Executive Director of the Attorney General's Commission on Pornography. In that capacity he oversaw and supervised the drafting of

that Commission's Final Report, with its Recommendation Number 7 that state legislature should amend obscenity statutes to conform with the current standard enunciated by the Court in Miller v. California.

Morality in Media of Wisconsin, Inc. (MMW) is a non-profit, non-denominational state organization affiliated with the national Morality in Media, Inc. MMW's goal is to stop the trafficking of hard-core pornography by providing education, communication and support for concerned Wisconsin communities and victims of pornography, and as an umbrella organization bringing together into a coalition over 50 state organizations and contacts concerned with the same issues and problems of pornography in Wisconsin. MMW was the

prime coordinator for passage of Section 944.21, the obscenity law at issue in this case.

Children's Legal Foundation, National Family Legal Foundation and Morality in Media of Wisconsin are profoundly concerned with the distribution of obscene materials and its detrimental effect on children and society in general. They believe the Wisconsin law at issue is a constitutional and a necessary method of deterring and eliminating the distribution of obscene materials. CLF filed an amicus curiae brief in this case before the Seventh Circuit.

INTRODUCTION

Petitioners are seeking review of the Seventh Circuit's decision upholding

Wisconsin's obscenity statute as constitutional against both due process and equal protection challenges. Kucharek v. Hanaway, 902 F.2d 513 (7th Cir. 1990).

The Seventh Circuit held that Section 944.21 of the Wisconsin Statutes Annotated might contain an ambiguity as to whether simulated, as well as actual, sexual activities are forbidden. However, the court found that "this will not in itself make the statute vague," and "once the issue is resolved by the Wisconsin courts, the ambiguity will be dispelled, (and) the discretion of the law enforcement authorities of Wisconsin canalized." Id. at 519. The court concluded: "There is no failure of fair notice" to defendants and thus no due process violation. Id.

On the equal protection issue, the Seventh Circuit found a rational basis existed for the statutory exemptions being challenged and that no equal protection problems existed. Id. at 520-21.

The essence of the court's decision was that it was a matter of state statutory construction, best left for Wisconsin courts, and that no federal constitutional questions were at issue.

Amici urge the Court not to grant the Petition for a Writ of Certiorari filed by the petitioners. The Seventh Circuit's decision is not in conflict with any other court of appeals, is not in conflict with a state court of last resort, does not depart from accepted and usual course of judicial proceedings, and has not decided an

important question of federal law which has been unsettled or is in conflict with this Court's decisions (nor do the petitioners allege otherwise.) Additionally, as the brief argument which follows demonstrates, the petitioners are incorrect on the merits of the case.

ARGUMENT

I. Section 944.21 Is Not Unconstitutionally Vague And Meets Due Process Requirements Of Fair Notice.

Section 944.21(2) of the Wisconsin Statutes Annotated defines obscene material to mean:

> [A] writing, picture, sound recording or film which:
>
> 1. The average person, applying contemporary community standards, would find appeals to the prurient interest if taken as a whole;

> 2. Under contemporary community standards, describes or shows sexual conduct in a patently offensive way; and
>
> 3. Lacks serious literary, artistic, political, educational or scientific value, if taken as a whole.

Subsection (e) of that same section states:

> "Sexual conduct" means the commission of any of the following: sexual intercourse, sodomy, bestiality, necrophilia, human excretion, masturbation, sadism, masochism, fellatio, cunnilingus or lewd exhibition of human genitals.

The "fair warning requirement prohibits the states from holding an individual 'criminally responsible for conduct which he could not reasonably understand to be proscribed.'" Rose v. Locke, 423 U.S. 48, 49, (1975) (citations omitted). The Court went on to say:

> But this prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for '[i]n most English words and phrases there lurks uncertainties.' . . . Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid.

423 U.S. at 49-50 (citations omitted).

In Miller v. California, 413 U.S. 15 (1973), the Supreme Court set forth guidelines to lead the states in defining obscenity. However, nothing in Miller is meant to be "magical language" which all state statutes must mirror. The Court in Miller specifically stated that: "We emphasize that it is not our function to propose regulatory schemes for the states." Id. at 25.

A state law that regulates obscene material which is limited, as written or construed, by the following guidelines is constitutional. The basic guidelines for the trier of fact must be: (1) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Miller, 413 U.S. at 24.

The Wisconsin obscenity act is closely tailored to conform to the Miller standards. The petitioners are

inviting the Court to revisit Miller, but as the Court previously noted: "Yet, this is nothing less than an invitation to overturn Miller -- an invitation that we reject." Fort Wayne Books, Inc. v. Indiana, 489 U.S. ___, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989).

The Wisconsin statute specifically defines what sexual conduct falls within its reach: sexual intercourse, sodomy, bestiality, necrophilia, human excretion, masturbation, sadism, masochism, fellatio, cunnilingus, or lewd exhibition of human genitals. Wis. Stat. Section 944.21(2)(e). It is the description or showing of the commission of said specific acts which are prohibited. There can be no doubt as to what kind of sexual conduct, if shown, this statute intends to reach.

The Supreme Court in Ward v. Illinois, 431 U.S. 767 (1976) found that state courts may "authoritatively construe" an otherwise defective statute to conform to the Miller requirements. An argument could be made, and the Seventh Circuit so found, that if allowed the Wisconsin Supreme Court could construe Section 944.21(2) in pari materia with the requirements of Miller [See, Turoso v. Cleveland Municipal Court, 674 F.2d 486 (6th Cir. 1982)], and as a result "patently offensive representation or descriptions of ultimate sexual acts, normal or perverted, actual or simulated" would be prohibited. But absent the Wisconsin court's opportunity to do so, there is no question that the showing or describing of actual sexual conduct is

prohibited.

The petitioners can not argue with any credence that they do not have fair notice of what conduct is proscribed. They know that the distribution of hard-core pornography may bring prosecution. This Court recognized the problems of defining "obscenity," but yet held that dealers had been given fair notice when it came to hard-core pornography:

> If the inability to define regulated materials with ultimate, god-like precision altogether removes the power of the States and Congress to regulate, then 'hard core' pornography may be exposed without limit to the juvenile, the passerby and consenting adult alike...

Miller, 413 U.S. at 27-28.

The Seventh Circuit found that a possible ambiguity might exist in Section 944.21, but that any ambiguities "can be dispelled at a stroke by

interpretation" and thus not vague in a constitutional sense:

> Either the Wisconsin statute forbids realistic simulations of sex along with actual depictions (provided of course that the simulation as well as the actual depiction is patently offensive), or it does not; once the Wisconsin courts resolve that issue, the ambiguity will be dispelled, the discretion of the law enforcement authorities of Wisconsin canalized.

Kucharek, 902 F.2d at 519.

The issues raised by petitioners are appropriate for the Wisconsin courts to resolve, in that they involve questions of state statutory construction. But in the meantime, even without a judicial opinion construing it, the plain language of Section 944.21(2) provides "fair notice" to dealers of the proscribed materials and

satisfies constitutional due process requirements.

II. THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE IS NOT VIOLATED BY THE STATUTE'S EXEMPTION OF SCHOOLS, LIBRARIES, AND CONTRACT PRINTERS.

Petitioners also complain that the statute exempts schools, libraries, other similar institutions, employees thereof, and contract printers. This, they argue, violates the equal protection clause.

Petitioners' argument is without merit. The traditional yardstick for measuring equal protection claims is the "reasonable basis" test. This standard was set forth in McGowen v. Maryland, 366 U.S. 420, 425-26 (1961):

> The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to

> the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

In Dandridge v. Williams, 397 U.S. 471, 485 (1970), it was stated:

> If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."

While a more stringent standard is applied in cases involving either a suspect class or a fundamental right, the appropriate standard for review of statutory classifications in obscenity statutes is the "reasonable basis" test. The statutory classification herein does not involve a suspect class, e.g., race

or alienage, nor does it interfere with any fundamental right. Obscenity is not protected by the First Amendment. Miller, 413 U.S. at 23. The application of the "reasonable basis" standard has been utilized in and is consistent with those jurisdictions addressing statutory exemptions in obscenity statutes. See, e.g., Ripplinger v. Collins, 868 F.2d 1043, 1051 (9th Cir. 1989) [validating a cable television exemption]; M.S. News Co. v. Casado, 721 F.2d 1281, 1291 (10th Cir. 1983) [validating an exemption for "school, church, museum, medical clinic, hospital, public library, governmental agency, quasi-governmental agency"]. The Supreme Court has held that the "reasonable basis" test "employs a relatively relaxed standard reflecting the Court's awareness that the drawing

of lines that create distinctions is peculiarly a legislative task..." Massachusetts Board of Retirement v. Margia, 427 U.S. 307, 314 (1976).

Although it may not have been wise to exempt these classes, that is a decision best left to the legislature. Such exemptions are not uncommon in obscenity statutes. Appellate courts routinely uphold exemptions from obscenity statutes. For example, the following cases have upheld sundry exemption for clerks, projectionists, churches, schools, universities, libraries and museums on any one of several legislative goals. State v. Martin, 719 S.W.2d 522 (Tenn. 1986); 4000 Asher, Inc. v. State, 716 S.W.2d 190 (Ark. 1986); Com. v. Stock, 499 A.2d 308 (Pa.Super 1985); State v. Baker, 711

P.2d 759 (Kan.App. 1985); Com. v. Ferro, 372 Mass. 379, 361 N.E.2d 1234 (1977); In re Kimbler, 100 Cal.App.3rd 453, 161 Cal.Rptr. 53 (1979); Com. v. Bono, 7 Mass.App. 849, 384 N.E.2d 1260 (1979); People v. Illardo, 48 N.Y.2d 408, 423 N.Y.S.2d 470, 399 N.E.2d 59 (1979); State v. Lesieure, 121 R.I. 859, 404 A.2d 457 (1979); State v. J.R. Distributors, Inc., 82 Wash.2d 584, 512 P.2d 1049 (1973). Indeed, various exemptions from state obscenity statutes are the rule, not the exemption. The A.L.I. Model Penal Code and Commentaries specifically exempts "institutions or persons having scientific, educational, governmental or other similar justification for possessing obscenity material" and "non-commercial dissemination to personal associates of

the actor." Section 251.4(3), Model Penal Code.

In any event, as the district court correctly pointed out, these exemption provisions are severable from the remainder of the statute and the statute would be fully operable without them. Kucharek v. Hanaway, 714 F.Supp. 1499, 1522 (E.D. Wisc. 1989).

CONCLUSION

For the foregoing reasons, Amici urge the Court to not grant a Writ of Certiorari in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing "Brief of Amici Curiae Children's Legal Foundation, National Family Legal Foundation, and Morality in Media of Wisconsin, Inc. In Opposition Of The Petition For Writ Of Certiorari" has been sent by U.S. Mail, Postage Prepaid, on this 9th day of November, 1990 to:

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No. 90-608

In The

Supreme Court of the United States

October Term, 1990

WILLIAM H. KUCHAREK; SHANGRI-LA ENTERPRISES, INC., doing business as DENMARK BOOKSTORE; PARADISE ONE, INC., doing business as PARADISE VIDEO STORE; and GEM BOOKS, INC., doing business as PURE PLEASURE II BOOKSTORE,

Petitioners,

vs.

DONALD J. HANAWAY, Attorney General of the State of Wisconsin,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS

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CERTIFICATE OF INTEREST OF AMICUS CURIAE

The undersigned counsel of record for Racine News, Inc., Superb Video, Inc., City News, Inc., Sheridan News & Video, Inc., and Supreme Video, Inc., *amicus,* furnishes the following in compliance with Supreme Court Rule 29.1:

1. Racine News, Inc., Superb Video, Inc., City News, Inc., Sheridan News & Video, Inc., and Supreme Video, Inc., are all corporations existing under and by virtue of the laws of the State of Wisconsin.

2. None of the above-listed corporations has a parent corporation, nor is the stock of any listed corporation publicly held.

3. Only the undersigned attorney is expected to appear on behalf of *amicus,* and only to the extent of filing the attached brief.

Dated at Milwaukee, Wisconsin this 6th day of November, 1990.

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QUESTIONS PRESENTED FOR REVIEW

1. Does the prohibition of Wis. Stat. § 944.21 against the dissemination of obscene magazines and films, while omitting reference to obscene videotapes, deprive the petitioners of equal protection of the law?

2. Was there a compelling state interest or rational legislative basis for excluding obscene videotapes from the prohibitions of Wis. Stat. § 944.21?

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No. 90-608

In The

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INTEREST OF AMICUS CURIAE

All of the above Wisconsin corporations have retail outlet stores located throughout the State. All are primarily adult-oriented, with business interests identical in nature of those of the petitioners. The investments in said store, together with the revenues generated, are substantial in nature. Any final decision in this case will have the exact same impact on these corporations as on the litigants themselves.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, provides in part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Wisconsin Statute, § 944.21 (1987-88) provides in part:

> "944.21(2)(c) - 'Obscene material' means a writing, picture, sound recording or film . . . ."

SUMMARY OF ARGUMENT

Wisconsin's obscenity statute, § 944.21 prohibits the dissemination of obscene magazines and films, but omits any reference whatsoever to obscene videotapes. In view of other existing Wisconsin statutes closely related in subject matter wherein the legislature included specific reference to "videotapes" (as well as proscribing "recordings", "magazines", "films", and "motion pictures") indicates a legislative intent to *exclude* videotapes from

the prohibited materials incorporated in § 944.21.

Since there is no compelling state interest or rational legislative basis for such a classification, § 944.21 violates equal protection of the law.

REASONS FOR GRANTING THE WRIT

I.

THE OMISSION OF VIDEOTAPES FROM WIS. STAT. § 944.21, WHILE INCLUDING "WRITING, PICTURE, SOUND RECORDING OR FILM", DEPRIVES PETITIONERS OF EQUAL PROTECTION OF THE LAWS.

The exclusion, in § 944.21 Wis. Stats., of obscene videotapes from the categories of prohibited material violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States in that it deprives the petitioners of equal protection of the law. "Obscene material" is confined in said statute to "a writing, picture, sound recording or film."

A videotape is a type of motion picture produced by electronic recording; a film, however, is produced by photography, *i.e.*, "the art or process of producing images on a sensitized surface (as a film) by the action or radiant energy and especially light." (*See Webster's New Collegiate Dictionary* at 864 (1973).)

The Wisconsin legislature's knowledge of these differences between films and videotapes is apparent. When it has intended enactments to refer to videotapes, it has used the terms "videotape" or "tape". *E.g.*, Wis. Stat. §§ 19.35(d), 136.01(9), 967.04(7), and 885.40, *et seq.* When the legislature has intended enactments to apply to both films and videotapes, it has either included both "film" and "videotape", or "film" and "tape",

e.g., Wis. Stat. §§ 19.32(2), 44.015(3), 51.61(1)(o), 77.54(23m), 968.13(2), or a broader descriptive term such as "audio-visual materials in any format," *e.g.*, Wis. Stat. § 943.61(1)(c).

The United States Congress and numerous state legislatures similarly have recognized that the term "film" does not include "videotapes." Typical enactments contain references to both terms. *See, e.g.*, 26 U.S.C. § 263A(b); 26 U.S.C. §§ 465(c)(1)(A), 465(c)(2)(A)(i), and 465(c)(7)(E)(ii)(II); 38 U.S.C. § 1796(b); 42 U.S.C. § 2000aa-7(a); Cal. Rev. & Tax Code § 6006(g)(1); Ill. Rev. Stat. ch. 38, § 11-20.1; Minn. Stat. § 617.246; Mo. Rev. Stat. § 573.010; and, N.M. Stat. Ann. § 30-6A-2.

In fact, obscenity laws in other jurisdications have specifically distinguished videotapes from other formats. *E.g.*, S.C. Code Ann. § 6-15-375(2).

Most importantly, the Wisconsin legislature reserved the terms "film" and "videotape" for separate and distinct references in the context of sexually explicit materials. In Wis. Stat. § 940.203, the legislature proscribed the recording or photographing of a child engaged in sexually explicit conduct. In each of the statute's subsections, the legislature separately described "film" recordings and "videotape" recordings. Subsection (1): ". . . filming, videotaping . . ."; (2): ". . . film, videotape . . ."; (3): ". . . filmed, . . . videotaped . . .".

Furthermore, an examination of Chapter 948, Wis. Stats. 1987-88, entitled "Crimes Against Children", discloses numerous inclusions of some form of the term "videotape", and in each instance it is juxtaposed with either the term "film", "motion picture", or "recording". The inclusion or various references to "videotapes" in that was not mere surplusage. The legislature intended those references to be given individual and specific effect.

In its decision, the Circuit Court of Appeals stated:

> ". . . a videotape is a form of recording and also a form of film (loosely understood), so there is no semantic barrier to fitting videotapes under the statute . . .".

Applying that rationale to the child pornography laws, results in negating any necessity for the legislature to have included the term "videotape" therein, thereby rendering its inclusion mere surplusage.

> ". . . statutes should be construed in a manner which will avoid a construction that makes a word or phrase superfluous." *Green Bay Broadcasting Company v. The Redevelopment Authority,* 116 Wis. 2d 1, 19, 343 N.W. 2d 27 (Wis. 1983).

> "A statute should be construed so that no word or clause shall be rendered surplusage and every word, if possible, should be given effect." *Donaldson v. State,* 93 Wis. 2d 306, 315, 286 N.W. 2d 817 (Wis. 1980).

> "Effect should be given to each word, clause and sentence in a statute." *State v. Smith,* 103 Wis. 2d 361, 365, 309 N.W. 2d 7 (Wis. 1981).

When the legislature enacted and subsequently revised § 940.203, now § 948.05 Wis. Stats., "Sexual Exploitation of a Child", and § 948.12 Wis. Stats., "Possession of Child Pornography", it clearly was *not* satisfied that the terms "film", "motion picture", "recording", and "photography" were broad enough or inclusive enough to incorporate within their separate and/or collective definitions the specific electronic process known as "videotaping".

For that reason, both the original § 90.203 Wis. Stats., and the 1987 revision thereof (§ 948.05 Wis. Stats.), included and subsequently retained the terms "videotape", "videotaping" and "videotapes".

Additionally, the legislative commentary relative to the *1987 - Act 332,* (§ 948.12 Wis. Stats.) states:

> "Creates a new criminal statute prohibiting possession of a film, photograph, *videotape* or other pictorial reproductions of a child engaged in sexually explicit conduct." (Emphasis supplied.)

The revision of § 948.05 and the enactment of § 948.12 all took place in the 1987-88 legislative biennium, *the very same biennium in which the challenged obscenity statute was promulgated.*

However, when delineating the material intended to be covered by Wis. Stat. § 944.21, the obscenity statute, the legislature specifically referred only to "a writing, picture, sound recording or film". No mention whatsoever was made with reference to the term "videotape".

The obscenity statute and the statutes relating to child pornography are closely related in subject matter. It defies logic to conclude that the legislature found it so compelling to include the terms "videotape" and "videotaping" on numerous occasions within the chapter dealing with "Crimes Against Children", and then inadvertently omitted all references thereto when enacting the obscenity statute, Wis. Stat. § 944.21.

The exclusion of any reference to "videotapes" in the obscenity statute was clearly by legislative design.

> "The only mode in which the will of the legislature is spoken is in the statute itself. Hence, in the construction of statutes, it is the legislative intent manifested in the statute that is of importance, and such intent must be determined primarily from the language of the statute. No intent may be imputed to the legislature in the enactment of a law other than such is supported by the face of the law itself. The courts may not speculate as to the probable intent of the legislature *apart from the words.* A statute is to be taken, construed, and applied in the form enacted. As a reason for these rules, it has been declared that *the legislature must be presumed to know the meaning of words, and to have used the words of a statute advisedly.*" *See* 73 Am. Jur. 2d, *Statutes,* § 196 at page 393. (Emphasis supplied.)

> "The starting point for interpreting a statute is the language of the statute itself; absent a clearly expressed legislative intention to the contrary, that *language must ordinarily be regarded as conclusive.*" (Emphasis supplied.) *Consumer Products Safety Commission v. GTE Sylvania, Inc.,* 64 L. Ed. 2d 766, 100 S. Ct. 2051 (1980).

Fundamental due process requires that every penal statute provide adequate and sufficient notice to those who would seek to avoid the consequences of the legislation. They are entitled to know precisely that conduct which will invoke its sanctions.

As written, the statute appears to exclude the sale and/or distribution of "videotapes". The failure of the statute to include any reference whatsoever to "videotapes", when other statutes related in subject matter make numerous references to that term,

appears to give notice that the omission was intended to exempt videotapes from its operation.

> "[I]t is assumed that whenever the legislature enacts a provision, *it had in mind previous statutes relating to the same subject matter,* wherefore it is held that in the absence of any express repeal or amendment therein, the new provision was enacted in accord with the legislative policy embodied in those prior statutes, and 'they should all be construed together.' " (Emphasis supplied.) *In the Interest of I. L. v. Milwaukee County,* 151 Wis. 2d 725, 731-32, 445 N.W. 2d 729 (Wis. 1989).

Nevertheless, both the trial and appellate courts concluded that the obscenity statute being challenged (Wis. Stat. § 944.21) *impliedly* forbids obscene videotapes.

No person may be subjected to the provisions of a criminal statute by implication. *The statutory offense must come within the actual words of the statute* and a court should not expand its scope in an attempt to save the statute by judicial interpretation.

> "It is a fundamental rule of criminal law that no case is to be brought within a statute charging an offense unless completely within its words; and no person is to be made subject to the provisions of a criminal statute by implication. *Bishop on Statutory Crimes,* §§ 194 and 220. This author says, § 194: 'Such statutes are to reach no further in meaning than their words; *no person is to be made subject to them by implication,* and all doubts concerning their interpretation are to preponderate in favor of the accused. Only those transactions covered by them which are within both

> the spirit and their letter'. A statutory offense, therefore, has precisely the proportions which the statute gives to it, and can have no other or greater." (Emphasis supplied.) *Laun v. Pacific Mutual Life Insurance Co.*, 131 Wis. 555, 572; 111 N.W. 660 (Wis. 1907).
>
> * * *
>
> "The legislature has expressed its intent, and, under elementary rules of law, *it is not the province of the court to extend the scope of a criminal statute.*" *Shinners v. State ex rel. Laacke,* 219 Wis. 23, 28, 261 N.W. 2d 880, 882 (Wis. 1935). *See also, State v. Schaller,* 70 Wis. 2d 107, 233 N.W. 2d 416, 419 (Wis. 1975).

The refusal of courts to expand the scope of criminal statutes to include offenses which are not completely within its words was recently demonstrated in *State of Iowa v. Applause Video, Inc.*, 434 N.W. 2d 864 (Iowa 1989).

Iowa's obscenity statute prohibits the "selling or offering for sale" of certain hard core pornography. The defendant was charged with violating that statute by "renting" the prohibited material to its patrons. The State proceeded on the theory that although the statute made no specific reference to "renting", nevertheless, the clear intent of the legislature was to also prohibit this type of activity and that to conclude otherwise would only lead to an absurd result.

The court rejected the State's contention:

> "The State argues strenuously that the legislature intended to proscribe rental of the

materials. It points out that it is incongruous, even absurd, to suppose the legislature would undertake to prohibit the sale of obscene materials but at the same time allow persons to profit from their rental. The argument has decided appeal. One is hard pressed to understand how the legislature would wish to draw a line between two equally repugnant commercial transactions, *but it did just that.*" (Emphasis supplied.)

"According to the rubric we must search out the legislature's intent as shown by how it worded the statute, not by how it should or might have. Citizens, even those bent on conduct most would consider unacceptable, have a clear right to base a controversial course of conduct on a clear understanding of what the law actually prohibits. Hence, a criminal statute must give fair warning of the conduct which makes it a crime." (*Citing Bouie v. Columbia,* 378 U.S. 347, 350-351, 84 S. Ct. 1697, 1701, 12 L. Ed. 894, 898 (1964).

* * *

"It is the legislature, not the court, which is to define crime and ordain its punishment . . ." (*Applause Video* at page 865.)

See also, State ex rel. Husting v. State Board of Canvassers, 159 Wis. 216, 150 N.W. 542, 547 (Wis. 1915), wherein the Wisconsin Supreme Court quoted with approval the following language of Lord Campbell in *Coe v. Lawrence,* 1 El. & B. 516:

"I really cannot doubt what the legislature intended to do; but they have not carried it into

> effect . . . It is better that we should adhere to the words they have used, than that we should strive to amend it."

As indicated above, the Seventh Circuit Court of Appeals took the position that there is no semantic barrier for including videotapes within the purview of the statute since, "a videotape is a form of recording and also a form of film (loosely understood)".

The issue, however, is not whether a *loose understanding* of the words "recording" and or "film" could conceivably include the term videotape within their ambit, but rather does the statute in its present form provide fair and adequate *due process notice* that its prohibition extends to "videotapes", even though that term is neither mentioned nor referred to anywhere within said statute.

> "Due process requires that a criminal statute be sufficiently definite to give a person of ordinary intelligence, who seeks to avoid the penalties, fair notice of what conduct is required or prohibited and to allow law officers, judges and juries to objectively apply the law to a defendant's conduct without creating or applying their own individual standards to determine guilt." *State v. Bartlett,* 149 Wis. 2d 557, 439 N.W. 2d 595, 598 (Wis. C.A. 1989).

The principle of statutory construction requiring courts to give a criminal statute a narrow, strict and limited construction precludes *any* consideration for applying a "loose understanding" to any of its words or phrases.

> "Before a man can be punished, his case must

be plainly and unmistakably within the statute." *United States v. Brewer,* 139 U.S. 278, 288 (1891).

II.

THE OMISSION OF VIDEOTAPES FROM WIS. STAT. § 944.21 CANNOT BE SUPPORTED BY EITHER A COMPELLING STATE INTEREST OR A RATIONAL LEGISLATIVE BASIS.

Videotape materials by and large are the predominant medium for the dissemination of sexually explicit depictions in today's "adult" market. That being the case, there simply could not be rational, much less compelling state interest for a classification in an obscenity statute which deliberately omitted the major mechanism for disseminating sexually explicit depictions.

An analogous classification was declared unconstitutional under a Fourteenth Amendment equal protection analysis in *Wheeler v. State,* 281 Md. 593, 380 A.2d 1052 (Md. 1977), *cert. denied,* 435 U.S. 997 (Md. 1978).

There the court reviewed the Maryland obscenity law which imposed less rigorous controls on obscene films than it did on obscene magazines, photographs and other printed materials. The court determined that there could not be a rational basis for such a classification, necessarily implying that there could not have been a compelling state interest for such a classification.

> "[A] classification based upon control of obscene films and pictures more lenient than those imposed on other obscene matter certainly could not serve as a rational basis for that classification in light of the governmental objective." (380 A.2d at 1060).

"Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have relevance to the purpose for which the classification is made." *Baxstrom v. Herold,* 383 U.S. 107, 111 (1966). The standard contained in the rational basis test is not "toothless". *Mathews v. Lucas,* 427 U.S. 495, 510 (1976); *Sklar v. Byrne,* 727 F.2d 633, 640 (7th Cir. 1984).

In some instances courts have found justifications for omissions or exemptions in criminal statutes. For example, it is rational for a legislature to omit or exempt certain activities even though they may be similar in nature to the prohibited acts, where the exempt activities pose a less serious societal danger. *See, e.g., Doe v. Edgar,* 721 F.2d 619, 622-23 (7th Cir. 1983). Likewise an omission or exemption has been upheld where the court has discovered evidence of a legislative intent eventually to expand the prohibitions of the statute to the omitted class of activities. *See, e.g., Peterson v. Lindner,* 765 F.2d 698, 707 (7th Cir. 1985).

Reasons, such as these, that have justified omissions or exemptions in other cases do not arise under § 944.21. There is no evidence that magazines, films and other materials, as opposed to videotapes, pose a greater societal danger.

In fact, if distribution of obscene materials to adults does present a societal danger, it would hardly seem rational to exclude obscene videotapes from the operation of § 944.21, given the evidence that videotapes now are the pervasive medium for viewing sexually explicit conduct. For example, the Meese Report concluded that the VCR has become ". . . the dominant mode or presentation of non-still (pornographic) material . . . ." United States Department of Justice, Final Report: "Attorney General's Commission on Pornography" (Washington: U.S. Government Printing Office, 1986).

Moreover, there is no evidence to support an argument that the present legislation is part of an overall plan to expand or create more comprehensive prohibitions that will eventually encompass videotapes.

In *Salem Inn, Inc. v. Frank,* 522 F.2d 1045 (2d Cir. 1975), the court reviewed a topless dancing ordinance that applied to ". . . cabarets, bars, lounges, dance halls, discotheques, restaurants and coffee shops . . .", but did not apply to opera houses, theaters, playhouses, ballets or movies. Noting that the ordinance would permit a burlesque theater to operate legally, while a cabaret could not stage a production of "Hair", the court applied the rational basis test, and then concluded:

> "[T]he Town has failed to show any legitimate underlying municipal interest to which its discrimination among various commercial establishments can be rationally related." (*Id.* at 1409).

In the same vein, there cannot arguably be a legitimate state interest in promulgating an obscenity statute such as § 944.21 with an intent to discriminate among various commercial media offering allegedly obscene material.

CONCLUSION

For these various reasons, the exclusion of persons who deal in allegedly obscene videotapes and the inclusion of persons who deal in allegedly obscene film and printed matter, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

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